

DALA WEBSITE DECISION INDEX BY SUBJECT, WITH KEYWORD AND PHRASE DIGEST

Please note:

This Index and Digest covers DALA general jurisdiction decisions issued beginning in 2016. It will be updated periodically as additional DALA decisions are posted to the website. A separate document at the DALA website shows the organization of the Index and Digest by subject. An alphabetical table of the decisions included in the Index and Digest is also posted at the DALA website.

The Index and Digest is provided solely as a helpful finding aid. It is not intended that the decision summaries in the Index and Digest, or the Index and Digest's organization, be cited as authority.

AGRICULTURAL RESOURCES

Animal Shelter, Rescue and Adoption Operations

Pesticide Program

—Herbicide Application—Right of Way Management

Vegetation Management Plan Approval

Herbicide application to manage right of way - Electric transmission utility - Five year vegetation management plan approved by Department of Agricultural Resources and requiring Department's approval of yearly operating plan - Approval of operating plan for 2016 specifying areas off-limits to herbicide spraying, including Zone I areas with public water supply wells - Appeal of operating plan by Cape Cod municipalities where herbicides would be applied - Asserted interference with municipal obligation to provide drinking water to residents - Dismissal - Lack of standing - Failure to allege specific facts showing aggrievement (actual injury different in kind or magnitude from that suffered by general public) - Claim that leaching herbicides would enter groundwater from which towns may draw water unsupported by factual allegations regarding location of spraying relative to town water sources and likely direction of groundwater flow - Failure to assert detail sufficient to support claim that yearly operational plan was inconsistent with five-year vegetation management plan.

Town of Brewster v. Dep't of Agricultural Resources, Docket Nos. MS-16-393, 394, 395 and 396, Recommended Decision (Mass. Div. of Admin. Law App., Feb. 27, 2017).

WIC Farmers' Market Nutrition Program

—Farmers' Market Coupon Program Violations

Enforcement and Civil Penalties

CERTIFIED NURSE AIDE / HOME HEALTH AIDE DISCIPLINE

Abuse

Certified Nurse Aide - Nursing home resident - Abuse - Willfulness - Insufficiency of evidence - Clarification of decision - Administrative Magistrate's discretion in assessing witness credibility and weight of testimony - Determination as to violation alleged - Moving nursing home resident without assistance or use of gait belt - Evidence showed neglect (not charged) but not abuse - No entry of nurse aide's name in Nurse Aide Registry.

Dep't of Public Health v. Bernal, Docket No. PHNA-16-314, Ruling on Motion for Clarification – Revised Conclusion and Order (Mass. Div. of Admin. Law App., Dec. 21, 2016).

Certified Nurse Aide - Nursing home resident - Abuse - Willfulness - Transfer of resident from bed to walker without required assistance - Bruising to forearm - Insufficient evidence of abuse - Unawareness that resident needed additional assistance due to visual impairment.

Dep't of Public Health v. Bernal, Docket No. PHNA-16-314, Decision (Mass. Div. of Admin. Law App., Nov. 30, 2016).

Certified Nurse Aide - Nursing home resident - Abuse - Willfulness - Walking frail resident too quickly or with excessive wrist or forearm grip - Thrown pillows - Insufficient evidence - Conflicting witness accounts.

Mbugua v. Dep't of Public Health, Docket No. PHNA-15-398, Decision (Mass. Div. of Admin. Law App., Sept. 7, 2016)

Neglect

Property Misappropriation

EDUCATOR LICENSE REVOCATION

Dismissal of Appeal

Notice of probable cause to revoke educator license - Criminal indictment, and failure to report it to Department of Elementary and Secondary Education - Lack of prosecution dismissal - Failure to attend two previously-scheduled mandatory prehearing conferences - Filing response to order to show cause regarding dismissal, following failure to appear at second prehearing conference, that asserted constitutional right not to appear at DALA conference prior to criminal trial, despite warning in order to show cause that continued pendency of criminal charges was not good cause for failing to attend conference.

Dep't of Elementary and Secondary Education v. Andrade, Docket No. MS-16-430, Final Decision-Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 27, 2017)

EMERGENCY MEDICAL TECHNICIAN CERTIFICATION

Revocation and Suspension of EMT Certification

EMT Paramedic - Immediate suspension and revocation of EMT certification by Department of Public Health (DPH) - Demonstration of sufficient grounds - Undisputed conviction of criminal offenses related to violence, and guilty plea as to two counts of assault and battery on household member (girlfriend) - Claim by EMT that he presents no danger to public and that police reports misstated events leading to criminal charges not disputable before DALA in view of guilty pleas and conviction - Violation of public trust and endangerment of public health and safety shown sufficiently by conviction of criminal offenses related to domestic violence - Unfitness of individual prone to violence to work with difficult, upset and combative persons encountered during EMT response - Failure to report criminal convictions within five days to DPH Office of Emergency Medical Service (OEMS) as required by agency's regulations - Duty to inform OEMS not discharged by informing fire department supervisor of convictions.

Dep't of Public Health, Office of Emergency Medical Services v. Pessini, Docket No. PHET-16-162, Recommended Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

EXPEDITED PERMITTING - M.G.L. c. 43D

Constructively-Granted Permit

Proposed planned commercial/industrial business development - Industrially-zoned area within designated “priority development site” - Town planning board’s failure to take final action on permit application before 180-day review period expired - Expedited permit granted constructively - Scope of constructive permit - Approval confined to work in priority development site that was proposed in permit application - Permit does not include conditions that planning board might have required had it acted within 180-day review period that Chapter 43D prescribes - Permit does not include, or preclude, work that town may require before “paper street” alongside project site was accepted as public way, including full turnaround for fire and emergency equipment and trucks entering and leaving developed site, where the site’s private and “paper street” sections meet, or other modifications to meet municipal and state traffic safety requirements and/or to improve traffic circulation.

Corliss Landing Condominium Tr. v. North Attleborough Planning Bd., Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

FAMILY CHILD CARE LICENSING

Family Day Care Provider License Denial

—Generally

Appeal challenging discretionary denial of family day care provider license by Department of Early Education and Care (EEC) - Broad discretion of EEC to decide whether applicant has provided clear and convincing evidence of suitability for licensing in light of concern for safety of children - Denial evaluated on appeal to DALA not to second-guess EEC but, instead, to determine whether decision was based upon sufficient facts, was not arbitrary or capricious, or was not otherwise unsupported by law.

Dep’t of Early Education and Care v. Correa, Docket No. OC-16-548, Summary Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

—Denial of Original License Application

History of Child Neglect

Discretionary family day care provider license denial by Department of Early Education and Care (EEC) in late 2016 - Background check by Department of Children and Families showing neglect of her own children (1999 sexual abuse of applicant's then-five year old son by playmate as a result of lack of supervision; 28 days of school missed by then-six year old son who had already been held back for one year once before; 2008 neglect based upon admission by applicant that she disciplined her then-fourteen and eleven year old children by open-hand face slapping) - Determination of unsuitability for day care provider licensing - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Prior child neglect findings undisputed - Thoughtful and lengthy analysis of background check by Department of Early Education and Care and Department's discretionary decision to deny family child care license application - Applicant given opportunity to respond - Discretionary decision based upon sufficient facts, was not arbitrary or capricious, and was not otherwise unsupported by law - Undisputed material facts - Summary decision in favor of Department sustaining license denial.

Dep't of Early Education and Care v. Correa, Docket No. OC-16-548, Summary Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

—Denial of License Renewal

Disqualifying Background of Family Member

Denial of application to renew family day care provider license by Department of Early Education and Care (EEC) in late 2016 based upon unsuitability - Initial license approved in 2006 and renewed in 2012, both when applicant's son was under 15 and not subject to background record check, despite son having been found guilty, at age 12, of assault and battery charge - Massachusetts Criminal Record Information (CORI) check in 2016 revealed delinquency finding as to son regarding anal penetration of friend during sleepover, when both were 13, witnessed by victim's 10 year old brother - Discretionary license renewal denial by EEC based upon potential risk of harm to children based upon son's disqualifying background check, applicant's refusal to ensure that son was out of home during family day care hours, son's downplaying of earlier assault and battery conviction, and no demonstrated rehabilitation by son - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Applicant given opportunity to

respond - Discretionary decision based upon sufficient facts, not arbitrary or capricious, and not otherwise unsupported by law - Undisputed material facts - Summary decision in favor of Department sustaining denial of family day care provider license renewal.

Dep't of Early Education and Care v. Hoyt, Docket No. OC-17-034, Summary Decision (Mass. Div. of Admin. Law App., Apr. 27, 2017).

Family Day Care Provider License Suspension

Child neglect - Failure to comply with applicable Department of Early Education and care regulations resulting in emergency situation endangering lives of children in day care program - Violations observed during unannounced Department inspections - Infant asleep in bouncy seat in room that was not part of licensed day care space - Failure to provide separate mat, cot, sofa, portacrib, playpen, bassinet or bed, and blanket for each child - Provision of false and conflicting information about children enrolled in day care program - Uncorrected violations - Prima facie evidence - Occurrence of violations documented in 51B Report - Unnecessary to prove license-holder's knowledge of documented violations.

Dep't of Early Education and Care v. Sanchez, Docket No. OC-16-485, Recommended Decision (Mass. Div. of Admin. Law App., Jan. 6, 2017).

MEDICAL MARIJUANA

Medical Marijuana Certification

—Authority to Issue, and Delegation of Authority

Physician - Summary suspension by Board of Registration in Medicine - Alleged delegation by physician to nurse practitioner of authority to issue medical marijuana certification - Recommendation to not suspend - Insufficient evidence of delegation - Independent authority of nurse practitioners to issue marijuana certification.

Bd. of Registration in Medicine v. Nadolny, Docket No. RM-16-238, Recommended Decision (Mass. Div. of Admin. Law App., Sept. 23, 2016).

Dispensary Agent Registration

—Temporary Revocation

Medical Use of Marijuana Program - Dispensary Agent - Registration - Temporary revocation - Recommendation to suspend and revoke dispensary agent registration - Submission of misleading, incorrect, false or fraudulent dispensary agent application (omission of information regarding prior conviction for distributing marijuana, positive testing for THC and revocation of probation) - Due to lack of notice, no recommendation of suspension pursuant to Department of Public Health Guidance for Registered Marijuana Dispensaries Regarding Background Checks or agency policy that dispensary agents must be honest.

Dep't of Public Health Medical Use of Marijuana Program v. Willis, Docket No. PH-15-589, Decision (Mass. Div. of Admin. Law App., Sept. 19, 2016).

PHYSICIAN DISCIPLINE

Conduct Placing Into Question Competence to Practice Medicine

Inappropriate restraint of, and disruptive behavior toward, psychiatric patient presenting no danger to herself or others - Mitigating factors - Tense circumstances at psychiatric hospital.

Bd. of Registration in Medicine v. Kohn, Recommended Decision (Mass. Div. of Admin. Law App., July 8, 2016).

Conduct Undermining Public Confidence in Integrity of Medical Profession

Practicing medicine in violation of probation agreement with Board of Registration in Medicine and permanent restrictions imposed by Board on medical license following allegations of substandard practice (practice of medicine confined to private offices; no performance of surgical procedures, whether in-patient, out-patient or office-based; practice limited to performance of non-surgical orthopedics and conducting independent medical examinations; expansion of this restricted medical practice prohibited - indefinite suspension of license to practice medicine stayed pending compliance with probation agreement) - subsequent expansion of practice - Treating workers' compensation claimants and providing rehabilitation services and physical medicine (performing examinations and then referring patients for physical therapy treatments by individual whose license to practice medicine had been revoked by Board following criminal convictions on multiple controlled substances violations unsupervised by licensed physician) and ownership interest in this practice - Failure to notify Board of this business relationship or involvement of person with revoked medical license - Failure to disclose, to Board, ownership interest in facility providing physical therapy services - Aiding and abetting unlicensed person to perform activities requiring a license - Performance of activities beyond conducting independent medical examinations, as required by probation agreement, and therefore outside parameters of restricted license to practice medicine - Conduct undermining public confidence in integrity of medical profession, and comprising dishonesty, fraud or deceit related to practice of medicine - Lifting of stay of indefinite suspension of license to practice medicine sustained.

Bd. of Registration in Medicine v. Nasif (Ruling on Motion for Summary Decision and Recommended Decision (Mass. Div. of Admin. Law App., May 11, 2017).

Inappropriate restraint of, and disruptive behavior toward, psychiatric patient presenting no danger to herself or others - Mitigating factors - Tense circumstances at psychiatric hospital.

Bd. of Registration in Medicine v. Kohn, Recommended Decision (Mass. Div. of Admin. Law App., July 8, 2016).

Failure to Meet Standard of Care

Alleged violation of standard of care by physician - Prescription of opioids to pregnant patient and to other patients without recognizing their drug-seeking behavior - Failure to develop and implement treatment plans and meet minimum requirements for medical recordkeeping - Physician's death following DALA hearing, filing of closing briefs, and closure of record - Recommended decision that matter be dismissed as moot.

Bd. of Registration in Medicine v. Fraser, Docket No. RM-13-224, Recommended Decision (Mass. Div. of Admin. Law App., May 4, 2017).

Ophthalmologist/retinal specialist - Insufficient Evidence - Diagnosis of retinal detachment and serous choroidal vitrectomy to reattach retina, possibility of melanoma or lesion noted, and clear treatment plan developed (patient 1) - Diagnosis of visual problems, including "floaters," following cataract procedure by another specialist, and performance of vitrectomy with lensectomy to remove retained lens fragments without subsequent complications (patient 2) - Reasonable choices of care between alternative treatment approaches.

Bd. of Registration in Medicine v Hughes, Docket No. RM-14-810, Recommended Decision (Mass. Div. of Admin. Law App., Mar. 30, 2016).

Gross Misconduct in Practice of Medicine

Practicing medicine in violation of probation agreement with Board of Registration in Medicine and permanent restrictions imposed by Board on medical license following allegations of substandard practice (practice of medicine confined to private offices; no performance of surgical procedures, whether in-patient, out-patient or office-based; practice limited to performance of non-surgical orthopedics and conducting independent medical examinations; expansion of this restricted medical practice prohibited - indefinite suspension of license to practice medicine stayed pending compliance with probation agreement) - subsequent expansion of practice - Treating workers' compensation claimants and providing rehabilitation services and physical medicine (performing examinations and then referring patients for physical therapy treatments by individual whose license to practice medicine had been revoked by Board following criminal convictions on multiple controlled substances violations unsupervised by licensed physician) and ownership interest in this practice - Failure to notify Board of this business relationship or involvement of person with revoked medical license - Failure to disclose, to Board, ownership interest in facility providing physical therapy services - Aiding and abetting unlicensed person to perform activities requiring a license - Performance of activities beyond conducting independent medical examinations, as required by probation agreement, and therefore outside parameters of restricted license to practice medicine - Conduct undermining public confidence in integrity of medical profession, and comprising dishonesty, fraud or deceit related to practice of medicine - Lifting of stay of indefinite suspension of license to practice medicine sustained.

Bd. of Registration in Medicine v. Nasif (Ruling on Motion for Summary Decision and Recommended Decision (Mass. Div. of Admin. Law App., May 11, 2017).

Failure to determine with certainty that patient's care had been transferred to another cosmetic plastic surgeon before engaging in cybersex and text message flirtation.

Bd. of Registration in Medicine v. Perrone, Docket No. RM-14-311, Recommended Decision (Mass. Div. of Admin. Law App., July 1, 2016).

Malpractice

—Order of Default

Failure to file status reports as ordered - Failure to respond to or communicate with opposing party's counsel.

Bd. of Registration in Medicine v. Provow, Docket No. RM-13-510, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 22, 2016).

Misconduct in Practice of Medicine

Inappropriate restraint of, and disruptive behavior toward, psychiatric patient presenting no danger to herself or others - Mitigating factors - Tense circumstances at psychiatric hospital including disruptive patients and "Code Green" behavioral management emergency.

Bd. of Registration in Medicine v. Kohn, Docket No. RM-15-122, Recommended Decision (Mass. Div. of Admin. Law App., July 8, 2016).

Practicing Medicine While Ability to Practice is Impaired by Alcohol or Drugs

—Order of Default

Failure of physician to file answer to Board's statement of allegations - Notice of prehearing conference returned by U.S. Postal Service as "not deliverable as addressed" - Subsequent order to show cause why default should not enter for want of prosecution sent to same address but not returned by U.S. Postal Service - No response to order to show cause - Order of Default and Recommended Decision adverse to physician issued.

Bd. of Registration in Medicine v. Russell, Docket No. RM-17-089, Order of Default-Recommended Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Sexual Misconduct

—Insufficient Evidence

Married hospitalist - Patient with history of panic attacks admitted to hospital after presenting in emergency room with possible heart attack symptoms - Hospitalist diagnosed demand ischemia (stress on heart but not heart attack), discussed sources of stress in patient's life, including husband and children, switched medication from Atavan (prescribed previously for panic attack control) to longer-lasting Klonopin and told her to follow with her primary care physician for anxiety and with endocrinologist regarding high level of thyroid-stimulating hormone - Found patient attractive, hugged her and wished her good luck prior to discharge (which she found at the time to be strange but caring) but did not ask whether he could see her following her discharge from hospital - Discharge ended doctor-patient relationship for hospitalist - Shortly after returning home, patient initiated contact via Facebook friending request - Exchange of text messages, subsequent meeting in parking lot, at hotel, and in local park, all without sex - Hospitalist returned home to Florida and stopped responding to former patient's text messages - Exaggerated or misleading statements by former patient in complaint she filed against hospitalist regarding his intention to "maneuver" her into a sexual relationship that did not occur - Routine answers by hospitalist to patient's brief questions about use of Klonopan and Atavan during conversations following discharge insufficient to establish continuing doctor-patient relationship - No evidence of sexual relationship - No evidence that hospitalist used knowledge of former patient's medical problems to exploit her during brief romantic relationship following discharge from hospital - Evidence showed, instead, brief personal relationship between two adults with marital problems, following former patient's hospital discharge, and from which both backed away - No ethical violation.

Bd. of Registration in Medicine v. Soumelidis, Docket No. RM-15-25, Recommended Decision (Mass. Div. of Admin. Law App., May 2, 2016), *additional findings made following Board remand, without changing conclusions*, Amended Recommended Decision (Mass. Div. of Admin. Law App., Apr. 27, 2017).

Summary Suspension of Physician as Immediate and Serious Threat to Public Health, Safety or Welfare

—Generally

Immediacy and seriousness of threat or potential threat posed by physician to public health, safety or welfare - Evidence - Board of Registration in Medicine's delay in moving to suspend physician - Only slight indication that physician did not pose immediate and serious threat, or possible serious threat, to public health, safety or welfare - Testimony by Board investigator that investigation related to physician's conduct took a year, depending upon Board's staffing, how readily records and experts could be obtained, and whether it had higher priorities, and potentially more serious dangers to public health, it needed to address - Delay in taking disciplinary action not necessarily indicative of lack of immediate and serious threat to public health, safety or welfare.

Bd. of Registration in Medicine v. Cushing, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

—Insufficient Evidence

Physician licensed to issue medical marijuana certificates and working at medical marijuana practice - Issuance of medical marijuana certificate to pregnant patient, three months before child's birth, while patient was taking Subutex (similar to Suboxone), from which baby would later require withdrawal - No action by Board of Registration in medicine for more than 1½ years after receiving complaint from staffperson at Massachusetts Department of Children and Families regarding physician's issuance of medical marijuana certificate to pregnant mother - Physician established bona fide relationship with patient - No record support for Board's argument that physician could not have spent more than 20 minutes with patient based upon total number of medical marijuana certificates he issued and number of says he worked - Expert testimony (by physician board-certified in internal medicine and addiction medicine, with 15 years of experience as medical director of local hospital's addiction recovery program, and with academic credentials in addiction medicine) that 20 minutes of time with patient sufficed to determine whether had a debilitating medical condition qualifying for medical marijuana certification and establish a bona fide physician-patient relationship - Department of Public Health's medical marijuana regulations did not specify how doctors should evaluate patient and decide whether to issue medical marijuana certificate, and neither statute nor regulations did not disqualify anyone categorically from receiving a medical marijuana certificate, including a pregnant woman - Issuance of medical marijuana certificate to pregnant woman by physician did not itself show that physician

was immediate or serious threat, or may be a serious threat to public health, safety or welfare - Medical history of which physician was aware included four bad disks, severe back of several years' duration, worsening pain following epidural injection, ineffectiveness of physical therapy in relieving back pain, opinion of treating physician that surgery would not relieve pain, recent back injury, patient's pregnancy and addiction to opioids and participation in drug rehabilitation program taking Suboxone, which ruled out use of opioids for pain relief, and declining pain medication, patient's use of cane and back brace, patient taking Prozac and using marijuana, fetus already exposed to whatever risks were posed by use of Suboxone, marijuana and Prozac, risk that patient would seek illegal marijuana (with questionable concentration and quality, including risk of containing pesticide residue) if not issued medical marijuana certificate, risk that chronic pain posed to pregnant woman and fetus including fetal loss, stillbirth and pregnancy complications, patient's exhaustion of other medical options not posing known risks to fetus before seeking medical marijuana - Variability of medical and scientific studies regarding risks to children from exposure to medical marijuana while in womb - Reasonableness of issuing medical marijuana certificate to patient in circumstances - No violation of applicable standard of care - No violation of medical marijuana statute or regulations - Physician's subsequent decision not to issue medical marijuana certificates to pregnant women minimized any risk to public health, safety and welfare that such issuance would pose - Recommendation not to temporarily suspend physician.

Bd. of Registration in Medicine v. Cushing, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

Physician licensed to issue medical marijuana certificates and working at medical marijuana practice - Proposed summary suspension based upon physician's status as third-highest issuer of medical marijuana certificates in Massachusetts - No correlation between number of marijuana certificates issued and immediacy or seriousness of threat to public health, safety or welfare - Medical marijuana statute (St. 2012, c. 369) contemplated that some physicians licensed to issue medical marijuana certificates would issue more of them than would others - At least some large medical institutions avoiding involvement with medical marijuana due to receipt of federal funds and continuing illegality of marijuana under federal law - No allegation that physician violated medical marijuana statute or regulations promulgated under statute by Massachusetts Department of Public Health regulations other than as to single, pregnant patient - No control by physician over his ranking in terms of number of medical marijuana certificates issued in state - Expert opinion testimony (by physician board-certified in internal medicine and addiction medicine, with 15 years of experience as medical director of local hospital's addiction recovery program, and with academic credentials in addiction medicine) that judgment of physician care and conduct based upon number of marijuana certificates issued to patients without knowledge of those patients' circumstances was "unsound extrapolation of data to prove a preconceived belief" - No blanket immunity under

medical marijuana statute's immunity clause providing that physician shall not be penalized under Massachusetts law or denied any right or privilege for "[p]roviding a qualifying patient with written certification based upon a full assessment of the qualifying patient's medical history and condition, that the medical use of marijuana may benefit" that patient (*see* St. 2012, c. 369, § 3) - Immunity clause does mean, however, that physician cannot be disciplined for simple act of issuing one valid medical marijuana certificate, or (as in this case), 4,648 valid certificates, or for being the third-highest issuer of valid medical marijuana certificates - Recommendation not to temporarily suspend physician.

Bd. of Registration in Medicine v. Cushing, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

Physician's self-prescription of medication classified as controlled substance (Clonazepam) to assist sleeping and control seizures related to his Parkinson's Disease - Single instance of self-prescription five years earlier after prescription from another physician ran out - Conduct placed only physician at risk, and risk was hypothetical in circumstances - Recognition by physician that self-prescription was error - Unquestioned that self-prescription of controlled substance violated Board regulations - No evidence, however, that single instance of self-prescription in question likely compromised physician's professional objectivity and unduly influenced his medical judgment, or that he was an immediate and serious threat, or may be a serious threat, to the public health, safety or welfare - Recommendation not to temporarily suspend physician.

Bd. of Registration in Medicine v. Cushing, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

Improper delegation of physician's authority to issue medical marijuana certification to nurse practitioner - Recommendation to not suspend physician - Insufficient evidence of delegation - Independent authority of nurse practitioners to issue marijuana certification.

Bd. of Registration in Medicine v. Nadolny, Docket No. RM-16-238, Recommended Decision (Mass. Div. of Admin. Law App., Sept. 23, 2016).

Prescribing medication outside usual course of practice to girlfriends and female acquaintances with drug problems - Recommended limited suspension - Insufficient evidence to support general summary suspension - Sufficient to support suspension from prescribing to girlfriends and female acquaintances outside normal course of physician's hospital practice.

Bd. of Registration in Medicine v. Shepherd, Docket No. RM-16-350, Recommended Decision on Summary Suspension (Mass. Div. of Admin. Law App., Oct. 14, 2016).

PRACTICE AND PROCEDURE

Appealability to DALA

Decision Upon Written Submissions

Petitioner's waiver of hearing and submission of case upon written submissions, pursuant to 801 C.M.R. § 1.01(8)(c) - Appropriateness - Neither party disputed any facts presented or challenged any submitted documents - Appeal presented only legal issues that could be decided based upon the parties' exhibits and memoranda.

Hogan v. State Bd. of Retirement, Docket No. CR-16-243, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Directed Decision

—Granted as “Summary Decision” Following Hearing

Physician Discipline Appeals

Practicing medicine in violation of probation agreement with Board of Registration in Medicine and permanent restrictions imposed by Board on medical license following allegations of substandard practice (practice of medicine confined to private offices; no performance of surgical procedures, whether in-patient, out-patient or office-based; practice limited to performance of non-surgical orthopedics and conducting independent medical examinations; expansion of this restricted medical practice prohibited - indefinite suspension of license to practice medicine stayed pending compliance with probation agreement) - subsequent expansion of practice - Treating workers' compensation claimants and providing rehabilitation services and physical medicine (performing examinations and then referring patients for physical therapy treatments by individual whose license to practice medicine had been revoked by Board following criminal convictions on multiple controlled substances violations unsupervised by licensed physician) and ownership interest in this practice - Failure to notify Board of this business relationship or involvement of person with revoked medical license - Failure to disclose, to Board, ownership interest in facility providing physical therapy services - Aiding and abetting unlicensed person to perform activities requiring a license - Performance of activities beyond conducting independent medical examinations, as required by probation agreement, and therefore outside parameters of restricted license to practice medicine - Conduct undermining public confidence in integrity of medical profession, and comprising dishonesty, fraud or deceit related to practice of medicine - Lifting of stay of indefinite suspension of license to practice medicine sustained.

Bd. of Registration in Medicine v. Nasif (Ruling on Motion for Summary Decision and Recommended Decision (Mass. Div. of Admin. Law App., May 11, 2017).

Retirement Appeals - Accidental Disability Retirement

Insufficient evidence of work-related causation - Public school teacher assistant - Assignment to classroom with several behaviorally-challenged students - Fibromyalgia - Nausea, vertigo and disequilibrium - Superannuation retirement - Subsequent application for accidental disability retirement based upon medical conditions (Fibromyalgia, Meniere's Disease (severe vertigo) and Sjogren's Syndrome (long-term autoimmune disease affecting moisture-producing glands)) exacerbated by job requirements and work-related stress - Accidental disability denial

sustained on appeal - Undisputed material facts - Failure of teacher assistant to prove that she sustained compensable personal injury, or that her employment presented a hazard not common or necessary to all or a great many occupations - Vertigo and nausea symptoms occurred at work only once, and were generally experienced in the evening, after work - Absence from work toward end of employment due to leave to care for grandson under Family Medical Leave Act - No notice of injury report or incident report filed with employer - No evidence in record as to effect (if any) of medications she was taking in development of her vertigo - No showing of mature and established disability when teacher's assistant last performed her duties - No contemporaneous report in record from treating physician supporting teacher assistant's claim to be totally and permanently disabled on last day of employment - Admission, in disability retirement application, of non-job related factors exacerbating her Fibromyalgia, Meniere's Disease and Sjogren's Syndrome, including constant movement and exposure to elements and "all sorts" of weather conditions including hot, cold, rain and wind, none of which were job-related hazards, and all of which were common and necessary exposures related to daily life in New England - No positive medical panel evaluation supporting her claim (2 of 3 members voting yes as to disability and its permanence, of whom 1 voted yes and 1 voted no as to job-related causation, and 1 member voting no as to disability, based upon finding normal hearing and ears and no Meniere's Disease, and therefore not answering remaining questions as to permanence of disability and job-related causation) - No evidence that panel members lacked pertinent facts, applied erroneous standard or were biased.

Lambert v. Hampden County Regional Retirement Bd., Docket No. CR-15-209, Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Retirement Appeals - Group Classification for Retirement Purposes

Chicopee Electric Light Department - Field engineer - Group 1 classification - Review of Light Department positions by Chicopee Retirement Board to determine whether positions were classified properly - Determination that Light Department field engineer and field engineer supervisor positions should be assigned in Group 1, not Group 4 - Specification of positions included in Group 4 by M.G.L. c. 32, § 3(2)(g) - "employees of a municipal gas or electric generating or distribution plant who are employed as linemen, electric switch board operators, electric maintenance men, steam engineers, boiler operators, firemen, oilers, mechanical or maintenance men, and supervisors of said employees who shall include managers and assistant managers" - "Field engineer" not one of positions specified by statute - Undisputed that petitioner did not supervise any Group 4 employees - Group 1 classification affirmed.

Swain v. Chicopee Retirement Bd., Docket No. CR-15-80, Decision (Mass. Div. of Admin. Law App., May 26, 2017).

Discovery

—Document Requests

Motion to Compel Production of Documents

Motion denied - Retirement appeal - Creditable service purchase request by retired public school teacher for prior teaching at nonpublic school (Boston School for the Deaf operated by Sisters of St. Joseph) - Denial by retirement system - Teacher's eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Request by teacher to retirement system for documents regarding other system members allowed retirement credit for prior service at Boston School for the Deaf - Information beyond scope of material factual issues, notwithstanding retirement system's production of limited, redacted documents regarding members who taught previously at the School but had not worked there for ten years and did not qualify for retirement benefit from Sisters of St. Joseph Retirement Plan - No discretion under statute to allow retirement credit for prior service at School if retirement system member qualified for benefit under Retirement Plan - Order to compel production of other documents unnecessary - Retirement system produced documents and remained under continuing obligation to supplement production if it found other relevant documents.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Compel Production of Documents (Mass. Div. of Admin. Law App., May 24, 2017).

Motion to Serve Record-Keeper Subpoena

Appeal of creditable service purchase denial - Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Subpoenas to record-keepers of successors to Plan administrator and actuary - Records regarding contributions to Plan, and payment by Plan to former teacher - Relevance to factual inquiry under M.G.L. c. 32, § 4(1)(p): whether teacher was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School

for the Deaf ended was retirement allowance - Subpoenas allowed.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

—Interrogatories

Generally

Prior leave of Administrative Magistrate required for service of interrogatories - Standard for deciding motion for leave to serve - Relevance of information sought - “Relevant information” not defined by Standard Rules of Practice and Procedure - Application of standards used by courts to determine relevance of information sought through discovery under Massachusetts and Federal Rules of Civil Procedure.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Retirement Appeals

Proposed interrogatories to contributory retirement system - Appeal of creditable service purchase denial - Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from “any source” precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Proposed interrogatories related to denial of creditable service based upon eligibility to receive retirement allowance from any source allowed as seeking relevant information - Proposed interrogatories asking whether tuition of students that teacher taught at Boston School for the Deaf was publicly funded in whole or part denied as seeking irrelevant information - Retirement credit not denied on this ground, and no claim on appeal that it was - Proposed interrogatories seeking information regarding other public school teachers allowed retirement credit for prior teaching service at Boston School for Deaf denied as seeking irrelevant information - Denial of credit for prior teaching service at nonpublic school pursuant based upon eligibility for retirement benefit from “any source” not discretionary - Teacher allowed to pursue discovery via allowed interrogatories, and via subpoenas to successor to Retirement Plan

administrator and actuary, regarding factual issues relevant to inquiry under M.G.L. c. 32, § 4(1)(p): whether she was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Dismissal

—Lack of Jurisdiction Dismissal

Lack of Standing

Agricultural resource appeals - Herbicide application to manage right of way - Electric transmission utility - Five year vegetation management plan approved by Department of Agricultural Resources and requiring Department's approval of yearly operating plan - Approval of operating plan for 2016 specifying areas off-limits to herbicide spraying, including Zone I areas with public water supply wells - Appeal of operating plan by Cape Cod municipalities where herbicides would be applied - Asserted interference with municipal obligation to provide drinking water to residents - Lack of standing - Failure to allege specific facts showing aggrievement (actual injury different in kind or magnitude from that suffered by general public) - Claim that leaching herbicides would enter groundwater from which towns may draw water unsupported by factual allegations regarding location of spraying relative to town water sources and likely direction of groundwater flow - Failure to assert detail sufficient to support claim that yearly operational plan was inconsistent with five-year vegetation management plan.

Town of Brewster v. Dep't of Agricultural Resources, Docket Nos. MS-16-393, 394, 395 and 396, Recommended Decision (Mass. Div. of Admin. Law App., Feb. 27, 2017).

Mootness

Physician discipline appeal - Alleged violation of standard of care by physician - Prescription of opioids to pregnant patient and to other patients without recognizing their drug-seeking behavior - Failure to develop and implement treatment plans and meet minimum requirements for medical recordkeeping - Physician's death following

DALA hearing, filing of closing briefs, and closure of record - Recommended decision that matter be dismissed as moot.

Bd. of Registration in Medicine v. Fraser, Docket No. RM-13-224, Recommended Decision (Mass. Div. of Admin. Law App., May 4, 2017).

Retirement appeals - Early Retirement Incentive Program (ERIP) - Denial of ERIP application - Employment by non-qualifying agency - University of Massachusetts - Appeals - Dismissal - Mootness - Withdrawal of ERIP application - Expiration of ERIP application deadline.

Jochim v. State Bd. of Retirement, Docket No. CR-15-328, Decision (Mass. Div. of Admin. Law App., Oct. 28, 2016).

Untimeliness

—Lack of Prosecution

Physician Discipline Appeals

Practicing medicine while ability to practice is impaired by alcohol or drugs - Failure of physician to file answer to Board's statement of allegations - Notice of prehearing conference returned by U.S. Postal Service as "not deliverable as addressed" - Subsequent order to show cause why default should not enter for want of prosecution sent to same address not returned by U.S. Postal Service - No response to order to show cause - Order of Default and Recommended Decision adverse to physician issued.

Bd. of Registration in Medicine v. Russell, Docket No. RM-17-089, Order of Default-Recommended Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Malpractice - Failure of physician to file reports, as ordered, on status of efforts to resolve matter based upon amended sanction - Failure to respond to or communicate with Board counsel.

Bd. of Registration in Medicine v. Provow, Docket No. RM-13-510, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 22, 2016).

Retirement Appeals

Early Retirement Incentive Program (ERIP) - Ineligibility - Group 1 classification for retirement purposes - Reclassification to Group 2 denied - Massachusetts Department of Mental Health - Clinical Social Worker “C” - Dismissal of appeal - Lack of prosecution - Failure to file prehearing memorandum and hearing exhibits, appear for hearing, or elect submission of appeal upon written filings - Statement of intention not to pursue appeal further.

Howard (Kathleen A.) v. State Bd. of Retirement, Docket No. CR-15-322, Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 13, 2017).

Educator License Revocation Appeals

Educator license revocation - Notice of probable cause to revoke license - Criminal indictment, and failure to report it to Department of Elementary and Secondary Education - Lack of prosecution dismissal - Failure to attend two previously-scheduled mandatory prehearing conferences - Filing response to order to show cause regarding dismissal, following failure to appear at second prehearing conference, that asserted constitutional right not to appear at DALA conference prior to criminal trial, despite warning in order to show cause that continued pendency of criminal charges was not good cause for failing to attend conference.

Dep’t of Elementary and Secondary Education v. Andrade, Docket No. MS-16-430, Final Decision-Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 27, 2017)

Wage and Hour Laws Appeals

Failure to timely pay wages to employee - Citation ordering payment of restitution and civil penalty - Lack of prosecution dismissal following warnings of this sanction - Failure to appear for status conference scheduled by prior order - Ignoring several prior orders directing petitioners to specify grounds on which they challenged citation, identify their hearing witnesses and the subject of their expected direct testimony, and identify their hearing exhibits - Petitioners’ failure to identify, on multiple occasions, their authorized representative or notify DALA or the Fair Labor Division of changes of address to which the petitioners were requesting that filings, or notices, orders and decisions issued, were to be mailed - Petitioners’ failure to respond to subsequent order to show cause why their appeal should not be dismissed - Appealed citation, including restitution amount and civil penalty, made final.

Chiles v. Fair Labor Div., Docket No. LB-14-439, Decision (Mass. Div. of Admin. Law App., Mar. 13, 2017).

Subpoenas

Motion to Serve Record-Keeper Subpoena

Appeal of creditable service purchase denial - Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from “any source” precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Subpoenas to record-keepers of successors to Plan administrator and actuary - Records regarding contributions to Plan, and payment by Plan to former teacher - Relevance to factual inquiry under M.G.L. c. 32, § 4(1)(p): whether teacher was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance - Subpoenas allowed.

Volpe v. Mass. Teachers’ Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Summary Decision

—Availability and Grounds, Generally

Absence of genuine, material factual issue requiring adjudication by hearing - Burden of party moving for summary decision to make this showing with competent evidence, as well as its entitlement to summary disposition in its favor as a matter of law.

Corliss Landing Condominium Tr. v. North Attleborough Planning Bd., Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

Party entitled to summary decision - Motion searches record to determine whether any genuine, material factual issue is presented - Party opposing motion may be granted summary decision if applicable law, and absence of genuine, material factual dispute, compels this outcome, even if opposing party did not cross-move for this relief.

Corliss Landing Condominium Tr. v. North Attleborough Planning Bd., Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

Denial of motion for summary decision - Grounds - Record reveals existence of genuine, material factual issue even if non-moving party filed no response to summary decision motion - Facts presented by motion or record insufficient to show absence of genuine, material factual issue.

Corliss Landing Condominium Tr. v. North Attleborough Planning Bd., Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

—Family Child Care Provider License Denial Appeals

Summary decision - Denial of application to renew family day care provider license by Department of Early Education and Care (EEC) in late 2016, following initial license approval in 2006 and renewal in 2012, both when applicant's son was not yet 15 and subject to background record check, despite son having been found guilty, at age 12, of assault and battery charge - Disqualifying background of family member - Massachusetts Criminal Record Information (CORI) check in 2016 revealed delinquency finding as to son regarding anal penetration of friend during sleepover, when both were 13, witnessed by victim's 10 year old brother - Discretionary license renewal denial by EEC based upon potential risk of harm to children based upon son's disqualifying background check, applicant's refusal to ensure that son was out of home during family day care hours, son's downplaying of earlier assault and battery conviction, and no demonstrated rehabilitation by son - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Applicant given opportunity to respond - Discretionary decision based upon sufficient facts, not arbitrary or capricious, and not otherwise unsupported by law - Undisputed material facts - Summary decision in favor of Department sustaining denial of family day care provider license renewal.

Dep't of Early Education and Care v. Hoyt, Docket No. OC-17-034, Summary Decision (Mass. Div. of Admin. Law App., Apr. 27, 2017).

Summary decision - Discretionary family day care provider license denial by Department of Early Education and Care (EEC) in late 2016 - History of child neglect - Background check by Department of Children and Families showing neglect of her own children (1999 sexual abuse of applicant's then-five year old son by playmate as a result of lack of supervision; 28 days of school missed by then -six year old son who had already been held back for one year once before; 2008 neglect based upon admission by applicant that she disciplined her then-fourteen and eleven year old children by open-hand face slapping) - Determination of unsuitability for day care provider licensing - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Prior child neglect findings undisputed - Thoughtful and lengthy analysis of background check by Department of Early Education and Care and Department's discretionary decision to deny family child care license application -

Applicant given opportunity to respond - Discretionary decision based upon sufficient facts, not arbitrary or capricious, and not otherwise unsupported by law - Undisputed material facts - Summary decision in favor of Department sustaining license denial.

Dep't of Early Education and Care v. Correa, Docket No. OC-16-548, Summary Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

—**Expedited Permit Appeals (M.G.L. c. 43D)**

Summary decision - Appeal challenging expedited permit for industrial/commercial development in industrially-zoned area within designated “priority development site,” granted constructively when town planning board’s failed to take final action on permit application before statutory 180-day review period expired - Appropriateness of summary decision to decide appeal - Parties’ joint status report identified no genuine, material factual issues precluding summary decision - Parties sought ruling as to legal issues only: whether any of procedural defects claimed on appeal required annulling constructively-granted permit; scope of permit (what work it allowed, whether any permit conditions were properly read into it, and which work was outside permit’s scope and was reserved for future resolution).

Corliss Landing Condominium Tr. v. North Attleborough Planning Bd., Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

—**Retirement Appeals**

Accidental Disability Retirement Benefits

Summary decision sustaining denial - Psychological or emotional injury - Police chief - Harassment by selectmen - Stress and depression - Absence of genuine or material factual issue - Injury not sustained within two years prior to accidental disability retirement application - Failure to file written notice of injury within 90 days after its occurrence.

Ackerman v. Worcester Regional Retirement Bd., Docket No. CR-11-405, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

—Veterans’ Benefits Appeals

Summary decision sustaining benefits suspension, and recipient’s placement into “refund status” for overpayment - Failure to look for work - Duplicative benefits - Rental assistance payments received while rent was being paid by another source.

Brelsford v. Dep’t of Veterans’ Services, Docket No. VS-15-594, Decision (Mass. Div. of Admin. Law App., Nov. 9, 2016).

—Wage and Hour Laws Appeals

Summary decision - Failure to pay overtime wages - Painting company - Willful failure to pay overtime wages - Second or subsequent offense - Citation demanding payment of restitution and civil penalty (\$7,500) affirmed - No response to Fair Labor Division’s motion for sufficiently made and supported summary decision motion showing no genuine dispute as to occurrence of violations, consideration of statutory penalty factors in determining whether to issue civil penalty, and applicable statutory maximum penalty amount for second or subsequent wage and hour violations (\$25,000).

Farh v. Fair Labor Div., Docket No. LB-15-107, Decision (Mass. Div. of Admin. Law App., July 12, 2016).

RETIREMENT

Accidental Disability Retirement Benefits

—Generally

—Grounds to be Proved

Causation (Causal Nexus Between Work-Related Injury and Disability)

Insufficient evidence of job-related causation - Emotional or psychological injury - Registry of Motor Vehicles Clerk IV - Alleged harassment and retaliation by RMV branch office staff from 1996 through 2010 - Claim of permanent disability based upon exposure to identifiable condition (constant workplace hostility and harassment) - Conflicts with co-workers and state trooper assigned to branch office - One-day suspension in 2000 for unprofessional conduct toward customer - Discipline overturned following grievance through union - Second suspension, for three-days, issued for directing customer to return unnecessarily to automobile insurer to correct registration error made by another RMV clerk - Loud, harsh and public verbal reprimand heard by fellow employees and by customers issued by supervisor - Suspension overturned following grievance - One-day suspension in 2001 for allegedly failing to assist another staffmember while on shift - Perception of being targeted for discipline not meted out to other staff - Employee entered comments about years of harassment, rude treatment and interference with job performance other staff and by management in response to FY 2002 employee performance review form - Management failure in late 2002 to respond to request to take personal day, and marked off-payroll, followed by grievance and attendance correction and reinstatement of pay - 2005 transfer to another RM, followed by three-day suspension for refusal to assist customers, refusal to process transaction for drive-up customer, damage to customer's car caused by opening emergency exit into customer drive-through area, a violation of branch rules, and other violations - Suspension rescinded following hearing - Transferred to another RMV branch in 2005, along with former supervisor - Perception that work environment at new branch was hostile - In March 2009, after questioning elderly customer about identification and medical support for handicap placard application, conflict with co-worker as to why she did not simply give the customer the placard, in view of her age - Manager sided with co-worker, prompting employee to complain of hostile treatment and working conditions - Subsequent verbal altercation, in July 2009, with co-worker upset about her work load, who told employee to mind her own business, called employee "stupid and crazy" and threatened to "kick [her] ass" - Co-worker not disciplined - Employee's request for transfer to a different RMV branch based on hostile work environment denied - Continued hostility by same co-worker, this time

with racial overtones - Employee fainted at work in July 2009, believed she was kicked when she was on floor, and was taken to hospital - After returning to work several days later, perception that other workers were trying to get rid of her - Employee filed complaint with union about workplace hostility in August 2009 - Conclusion by RMV counsel that employee had provoked the initial bickering with co-worker - Employee given written warning about her confrontational and volatile behavior, and then, in January 2010, after being overheard making comments about wanting to punch co-worker and give others what they deserved, placed on paid administrative leave pending determination as to whether she posed a danger to herself and others in workplace - Subsequent negative psychological fitness-for-duty evaluation, with examining physician's recommendation of intensive psychopharmacological and psychotherapeutic treatment prior to returning to work and re-evaluation, along with recommendation of occupational therapy to assist employee with workplace relations and working cooperatively with co-workers - Subsequent counseling and treatment generated diagnosis of serious mental illness including major depression, insomnia, low energy and anxiety - Dismissal from behavioral health treatment program due to conflict with another patient - Accidental disability retirement application filed in March 2011 based upon permanent disability due to severe depression, stress, anxiety and PTSD due to workplace harassment and retaliation - Unanimous affirmative medical panel certificate as to disability, permanence and work-related causation (identified by all three panel members as a series of work-related events) - Retirement Board approved ordinary disability retirement but denied accidental disability retirement application, despite unanimous affirmative panel certificate - Denial sustained - Neither employee nor her superiors filed any notice of injury between 1997 and 2010 despite allegations of continuing harassment - Employee's credibility as to continuing nature of alleged harassment, and reliability of her recollection of events suspect, on account of perceived constant fabrications and "set-ups" in five RMV branches over 13 years, with almost no supporting contemporaneous entries in medical records, and without any witness corroboration of employee's self-serving testimony - No evidence supporting claim of career-long exposure to workplace hazards - No identifiable condition not common and necessary to all or a great many occupations - No showing that alleged injury amounted to more than personal feelings of persecution and perpetual victimization.

O'Connor v. State Bd. of Retirement, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Insufficient evidence of job-related causation - Public school teacher assistant - Assignment to classroom with several behaviorally-challenged students - Fibromyalgia - Nausea, vertigo and disequilibrium - Superannuation retirement - Subsequent application for accidental disability retirement based upon medical conditions (Fibromyalgia, Meniere's Disease (severe vertigo) and Sjogren's

Syndrome (long-term autoimmune disease affecting moisture-producing glands)) exacerbated by job requirements and work-related stress - Denial of accidental disability retirement benefits sustained on appeal - Undisputed material facts - Failure of teacher assistant to prove that she sustained compensable personal injury, or that her employment presented a hazard not common or necessary to all or a great many occupations - Vertigo and nausea symptoms occurred at work only once, and were generally experienced in the evening, after work - Absence from work toward end of employment due to leave to care for grandson under Family Medical Leave Act - No notice of injury report or incident report filed with employer - No evidence in record as to effect (if any) of medications she was taking in development of her vertigo - No showing of mature and established disability when teacher's assistant last performed her duties - No contemporaneous report in record from treating physician supporting teacher assistant's claim to be totally and permanently disabled on last day of employment - Admission, in disability retirement application, of non-job related factors exacerbating her Fibromyalgia, Meniere's Disease and Sjogren's Syndrome, including constant movement and exposure to elements and "all sorts" of weather conditions including hot, cold, rain and wind exacerbated, none of which were job-related hazards, and all of which were common and necessary exposures related to daily life in New England - No positive medical panel evaluation supporting her claim (2 of 3 members voting yes as to disability and its permanence, of whom 1 voted yes and 1 voted no as to job-related causation, and 1 member voting no as to disability, based upon finding normal hearing and ears and no Meniere's Disease, and therefore not answering remaining questions as to permanence of disability and job-related causation) - No evidence that panel members lacked pertinent facts, applied erroneous standard or were biased.

Lambert v. Hampden County Regional Retirement Bd., Docket No. CR-15-209, Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Insufficient evidence of job-related causation - Correction officer - Post-traumatic stress disorder, depression and anxiety as a result of incidents witnessed and experienced directly as correction officer during two years of employment as correction officer - Decreased sleep and appetite, recurrent intrusive thoughts, and drinking after witnessing incidents between inmates - Tightness, chest pains, and arm pain after speaking with inmate outside his cell - Major depressive disorder and panic attack diagnosed by treating physicians - Unanimous affirmative psychiatric medical panel certificate as to disability, its likely permanence, and job-related causation - Retirement board denial of accidental disability retirement application despite panel certificate based upon lack of specific dates of injury due to inmate violence, and assertion of stress and trauma based in part upon allegations of injury to other correction officers that employee did not witness - Denial affirmed - Affirmative medical panel certificate not conclusive as to work-related causation - Injuries to third parties (including suicides and suicide attempts among correction officers)

insufficient to show compensable personal injury - Credibility issues - Failure to file incident reports as to violence witnessed - Discrepancies in narratives of alleged violence at correctional facility given to physicians, including apparent conflation of memories with alleged reports of co-workers - Presence at related incidents, or even being on duty at time, not documented by incident reports filed by others - Insufficient evidence of specific events that could serve as basis for accidental disability retirement application - No evidence of work environment different from those in which other correction officers worked - No evidence of outrageous working conditions in comparison with work other correction officers in facility performed - No evidence of work-related aggravation of pre-existing psychiatric condition, including depression related to childhood abuse, that appeared to have become clinically quiescent before correction officer employment began, particularly since employee did not followup with psychotherapy or trauma therapy recommended by treating physician and therefore could not show that treatment could not have resolved anxiety, depression and post-traumatic stress disorder - No workmen's compensation benefits awarded for any of the alleged work-related incidents - Receipt of lump-sum workmen's compensation benefit payment by agreement evidence of legal compromise only, not merits-based resolution of claim.

Gale v. State Bd. of Retirement, Docket No. CR-13-205, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Public school teacher - Aggravation of pre-existing injury (depression and anxiety longstanding since childhood) after 20 years of successful teaching with the aid of psychotherapy and prescribed psychiatric medication - Increasing anxiety about ability to perform classroom duties, meet deadlines and attend to student progress or lack of progress - Development of hair and weight loss, and hoarding and eating disorders, and worsening inability to concentrate, loss of organizational skills, and forgetful, incoherent thought, observed by treating psychiatrist - Attribution to difficult work environment at school, particularly difficult students, increasing administrative work load, and arrival of a new, critical and unsupportive principal - Teacher's transfer to new school with supportive principal, with resulting, but temporary, diminishment of anxiety and restored level of function as teacher - Resumption, and worsening, of psychiatric symptoms for five years following teacher's transfer - Affirmative certificate by psychiatric medical panel majority as to disability, permanence and causation - Rejection by Board following hearing, based upon minority panel member's rejection of work-related causation, for lack of specific traumatic at-work events, and opinion that natural progression of anxiety disorder, rather than work-related injury, caused increasing difficulty in managing job duties and, ultimately, the teacher's disability - Failure to prove job-related causation by preponderance of evidence - Affirmative medical panel findings as to causation not conclusive - No evidence of work-related event or series of events contributing significantly to teacher's psychiatric disability - Evidence supported underlying

anxiety about job duties, rather than conditions of job, as the significant factor precipitating teacher's disability - Failure to obtain workmen's compensation for psychological disability itself not preclusive of accidental disability retirement benefits - Failure to submit accidental disability retirement application within two years following allegedly-precipitating events at former school, with no workmen's compensation payments to mitigate lapse of time, violated timely application provisions of M.G.L. c. 32, §§ 7(1) and 7(3)(a).

Milton v. Boston Retirement Bd., Docket No. CR-14-19, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017)

Aggravation of pre-existing injury (knee osteoarthritis) - Public works department laborer - Knee injury (twisting and medial meniscus tear) sustained on the job - Unanimous negative panel finding as to causation - Medical panel error requiring examination by new panel - Plainly wrong conclusion and application of incorrect standard - Attribution of injury to weight and deconditioning without medical record support - Unreasonable expectation that weight loss and strength training would allow performance of essential job duties despite ineffectiveness of post-injury physical therapy.

Cayo v. West Springfield Retirement Bd., Docket No. CR-15-468, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

Aggravation of pre-existing injury (degenerative spinal condition) by work injury sustained in performance of job duties - Water system maintenance worker - Exposure to identifiable condition not common to a great many occupations - Regularly lifting and moving heavy machinery, pipes, and piles of dirt and rocks outdoors in trenches regardless of weather and light - Preponderance of evidence - Affirmative certificate by medical panel majority as to causation - Consistency with opinions of treating physicians and medical records.

Loura v. Taunton Retirement Bd., Docket No. CR-13-186, Decision (Mass. Div. of Admin. Law App., Dec. 2, 2016)

Aggravation of pre-existing injury (attention deficit hyperactivity disorder) by work injury sustained in performance of job duties - Head injury sustained upon falling from moving sanitation truck - Public works and sanitation department laborer - Preponderance of evidence - Unanimous affirmative certificate by medical panel (psychiatric) - Consistency with opinions of treating physicians and medical records - Absence of panel error - Appropriateness of psychopharmacological treatment following injury.

Hollup v. Worcester Retirement Board, Docket No. CR-15-221, Decision (Mass. Div. of Admin. Law App., Nov. 2, 2016).

Insufficient evidence of job-related causation - Sheriff's office employee - Lung cancer - Office mold exposure - Negative unanimous medical panel as to causation, based upon lack of solid medical evidence linking mold exposure to lung cancer development - Panel considered relationship mold may have played in development of employee's lung cancer - No evidence that panel applied incorrect standard or lacked pertinent information in reaching its conclusion, or that conclusion was plainly wrong - Fact that treating physician offered contrary opinion as to causation did not displace panel's medical opinion or show that panel applied incorrect standard - No evidence that treating physician suggested performance of tests relative to alleged connection between mold exposure and cancer before medical panel examined employee.

Hanover v. State Bd. of Retirement, Docket No. CR-12-575, Decision (Mass. Div. of Admin. Law App., Oct. 21, 2016)

Sufficient evidence of job-related causation - Principal clerk at municipal senior center - Preexisting injury (chronic left foot conditions and injuries treated previously by surgery) aggravated by work injury sustained in performance of job duties (fall in medical equipment shed while putting away wheelchair and commode, causing left foot to become jammed in wheelchair wheel) - Following injury, unresolving left foot reflex sympathetic dystrophy syndrome, intensifying left foot pain, marked changes in foot temperature, and need to use cane for ambulating - Affirmative certificate by orthopedic medical panel majority as to causation - Majority panel opinion entitled to great weight - No evidence panel majority applied incorrect standard, lacked pertinent medical facts, or engaged in procedural irregularities in reaching conclusion as to causation - Conclusion consistent with opinions of independent medical examiners and treating physicians that unresolving left-foot symptoms related to, and were likely exacerbated by, work injury in question - Medical evidence in record confirmed that left foot symptoms worsened to point of disability and would not

resolve over time.

Collari (Sharon) v. Marlborough Retirement Bd., Docket No. CR-15-179, Decision (Mass. Div. of Admin. Law App., Sept. 9, 2016).

Insufficient evidence of job-related causation - Probation case specialist with clerical and secretarial duties - Post-traumatic stress disorder (PTSD) allegedly caused by humiliation of having to meet with supervisors regarding unfair accusations against her, unfair targeting and discipline, and unkind and unequal treatment by supervisors and co-workers - Termination following alleged sick leave abuse, excessive personal use of work email, and conflicts with supervisor and co-workers - Unanimous affirmative certificate by medical panel (2 psychiatrists and 1 neurologist) as to disability (extreme anxiety), permanence and causation that alleged incidents in workplace caused PTSD not dispositive as to causation - No showing that supervisors did not engage in bona fide personnel actions - No showing that alleged workplace ill will, job conflicts and arguments with superiors and co-workers that generated feelings of persecution and unfair treatment was an identifiable condition not common or necessary to a great many occupations.

Sinopoli v. State Bd. of Retirement, Docket No. CR-15-223, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

Insufficient evidence of job-related causation - Steam fireman at state college - claimed work-related exposure to natural gas fumes following third party's gas line installation, and, during emergency room visit that followed, injury to hand during blood draw - no proof that right-sided weakness or confusion were caused by temporary workplace exposure to natural gas - absence of emergency room or other medical records, or employer's records, confirming gas exposure - Nearly three-year gap between alleged exposure and specific complaint - Unsupported hypothesis by treating physicians of reaction to natural gas exposure - No contemporaneous records connecting blood draw following alleged gas exposure to hand weakness - No affirmative medical panel certificate as to work-related causation of injury claimed - No improper panel composition or panel error - denial of accidental disability retirement benefits affirmed.

Maillet v. State Bd. of Retirement, Docket No. CR-13-327, Decision (Mass. Div. of Admin. Law App., June 3, 2016)

Insufficient evidence of job-related causation - Housing Authority maintenance worker - Left shoulder injury - Pain experienced first while lifting heavy bag of trash into dumpster, then while removing mowing deck from tractor - Questionable

subscapularis tear - History of other injuries and underlying cervical spondylosis - Medical panel - Negative majority panel finding as to job-related causation - No improper panel composition, or application of improper standard or other panel error - Denial of accidental disability retirement benefits affirmed.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

Insufficient evidence of job-related causation - Housing authority maintenance worker - Left shoulder injury - Refusal to undergo recommended surgery for torn rotator cuff - No disqualification from receiving a disability retirement - Medical providers disagreed as to existence of rotator cuff tear warranting surgical intervention, or whether shoulder pain resulted from arthritis and/or cervical pathology - Academic issue - Medical panel did not issue positive certification as to disability's job-related causation.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

Sufficient evidence of job-related causation - Disability as a result of single injury - Massachusetts Hospital School Nursing Assistant I - Transfer of patient from chair to bed during work shift - Immediate lower back injury with unresolving, disabling lower back pain - Inability to sit or stand for more than five minutes - Majority affirmative orthopedic medical panel opinion, and opinion of treating physicians, as to causal relationship between patient-transfer incident and disabling back injury - Credible testimony by petitioner as to incident and immediacy of back symptoms - No medical evidence of prior back problems or inability to perform duties, despite pre-existing obesity - Sufficiency of evidence to meet petitioner's burden of proof as to causation and shift burden of producing contrary medical evidence to retirement board.

Cobb v. State Bd. of Retirement, Docket No. CR-14-367, Decision (Mass. Div. of Admin. Law App., Feb. 3, 2017).

Disability (Disabling Injury Sustained During Employment)

Insufficient evidence of disability - Maintenance worker at correctional facility - Ankle sprain while spreading ice melt and sand on correctional facility steps - Return to work with varying degrees of foot pain, and ankle pain and stiffness, and ability to run, walk and stand - Varying diagnoses of treating physicians, including adult acquired flatfoot deformity - without finding of permanent work-related disability

or of worker having reached an end result in terms of treatment or ability to continue work with limitations on standing or use of supportive footwear - No imaging studies showing bone fracture - Whole body bone scan three years after injury showed degenerative changes in ankles and mid-feet - Worker performed duties at work for eight months before resigning from job - No evidence that worker was totally and permanently disabled on last day of work, which was four years after injury - Some evidence that worker argued with supervisor before resigning - Unanimous negative medical panel as to disability from performing essential job duties - No evidence panel members lacked pertinent facts including worker's job description and medical records or applied erroneous standards, or that conclusion as to lack of disability was plainly wrong - No entitlement to review by new medical panel.

MacGeachey v. State Bd. of Retirement, Docket Nos. CR-13-403, CR-16-220, Decision (Mass. Div. of Admin. Law App., Apr. 21, 2017).

Insufficient evidence of disability - District Attorney support staff at district court performing data entry, document scanning and duplication, case file preparation, general office and administrative support work - Right arm strain/frozen shoulder syndrome/rotator cuff tear while organizing file cabinet - Improved range of motion and decrease in pain level following rotator cuff surgery - Unanimous negative certificate as to disability by medical panel (2 orthopedic surgeons, one pain management physician) - No evidence that panel applied erroneous standard or lacked pertinent facts - Panel examination revealed modest range of motion loss in arm and shoulder - Medical records showed no large rotator cuff tears or post-surgical lifting requirements - Insignificant omissions from records given to medical panel members - Omissive job description describing receptionist's position without mentioning file management responsibility countered by employee's full description of duties to panel members, including frequently lifting and carrying files weighing 10-15 pounds, and panel's evaluation of file weight and range of motion needed to carry and lift files - Sufficient basis in medical records reviewed, and from employee's responses to questions during panel's examination, from which panel members could conclude that surgery had helped her despite lacking operative report - Panel's unchanged opinion following subsequent review of missing documents supplied by retirement board - No showing that further examination by medical panel would have provided new information material to disability - Request for new medical panel denied - Denial of accidental disability retirement application affirmed.

Henry v. State Bd. of Retirement, Docket No. CR-14-530, Decision (Mass. Div. of Admin. Law App., Oct. 21, 2016)

Insufficient evidence of disability - Developmental Service Worker - Knockdown during work shift during attempted contact by mentally-challenged male group home

resident - Lower back injury resolving over time - Post-injury surveillance video showing bending and lifting (picking up large parcels, pushing shopping carts, placing packages of various sizes into vehicle) - No complaint of shoulder injury or pain during physical therapy sessions following injury - Insufficient proof of total and permanent disabling injury sustained during employment.

Schofield (Debra) v. State Bd. of Retirement, Docket No. CR-13-494, Decision (Mass. Div. of Admin. Law App., May 6, 2016)

Permanence (Totality and Permanence of Disabling Injury Sustained During Employment)

Aggravation of pre-existing injury (knee osteoarthritis) - Public works department laborer - Knee injury (twisting and medial meniscus tear) sustained on the job - Unanimous negative panel finding as to causation - Medical panel error requiring examination by new panel - Plainly wrong conclusion and application of incorrect standard - Attribution of injury to weight and deconditioning without medical record support - Unreasonable expectation that weight loss and strength training would allow performance of essential job duties despite ineffectiveness of post-injury physical therapy.

Cayo v. West Springfield Retirement Bd., Docket No. CR-15-468, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

School custodian - Elbow, forearm and shoulder injury sustained on job - Permanence of injury - Medical panel error - negative panel majority finding as to permanence of disability - application of incorrect standard (medical certainty, rather than likelihood, of disability's permanence) - ongoing pain evaluation not preclusive of disability's likely permanence.

Lanni v. Everett Retirement Bd., Docket No. CR-15-116, Decision (Mass. Div. of Admin. Law App., Aug. 19, 2016).

Insufficient evidence of permanence - Department of Developmental Services, Developmental Service Worker I - Non-disabling knee, shoulder and arm injuries sustained while lifting or assisting clients at developmental facilities over several years prior to retirement, each time returning to full-time work - Full-duty work without accommodation prior to retirement - Disability retirement application based upon inability to lift or transfer group home residents, or perform outdoor maintenance duties, due to COPD, emphysema, severe arthritis, and numbness and pain in shoulder - Insufficient evidence of permanent disability on last day of work -

Absence of medical evidence - Social Security disability award based upon disability under federal law on day after superannuation retirement became effective - Not persuasive of permanent disability on last day of work - History of return to full-time work, and performance of full-time work without accommodations, persuasive of no permanent disability on last work day - Denial of accidental disability retirement application affirmed.

Closser v. State Bd. of Retirement, Docket No. CR-14-111, Decision (Mass. Div. of Admin. Law App., June 24, 2016).

Insufficient evidence of permanence - Housing Authority maintenance worker - Left shoulder injury - Pain first while lifting heavy bag of trash into dumpster, then while removing mowing deck from tractor - Questionable subscapularis tear - History of other injuries and underlying cervical spondylosis - Medical panel - Negative majority panel finding as to job-related causation - No improper panel composition, or application of improper standard or other panel error - denial of accidental disability retirement benefits affirmed.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

Insufficient evidence of causation - Housing authority maintenance worker - Left shoulder injury - Refusal to undergo recommended surgery for torn rotator cuff - No disqualification from receiving a disability retirement - Medical providers disagreed as to existence of rotator cuff tear warranting surgical intervention, or whether shoulder pain resulted from arthritis and/or cervical pathology - Academic issue - Medical panel did not issue positive certification as to disability's job-related causation.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

—Medical Panel Review

Entitlement to Initial Panel Review

Application for accidental disability retirement properly denied without convening medical panel - Retired firefighter - Accidental disability retirement application filed October 21, 2013, subsequent to superannuation retirement in April 2009 - Claimed “heart law presumption” for firefighters (M.G.L. c. 32, § 94) and history of atrial fibrillation as “hazard undergone” - No notice of injury filed with retirement board

as to asserted heart-related injury (palpitations and chest pain experienced while climbing stairs during response to house fire in 2006, five years prior to filing of accidental disability retirement application) - No mention of these symptoms or of firefighters' on-site evaluation by EMTs in incident report regarding this fire - No notice of injury filed regarding cardiac event in May 2007 - Hospital records reported history of hypertension, but electrocardiogram following 2007 event showed no atrial fibrillation - Firefighter declined hospitalization and signed himself out of hospital against medical advice - No workers' compensation-related exception to failure to file written notice of injury because firefighters, as Group 4 members, are not eligible to receive workers' compensation - Exception to notice of injury requirement based upon record of injury sustained on file in fire department's official records inapplicable as claimant produced no such record - Atrial fibrillation diagnosed on January 9, 2009 (prior to superannuation retirement), but followup EKG on January 29, 2009 showed regular heart rate and no atrial fibrillation, and firefighter was cleared to return to work - No treatment for atrial fibrillation until May 2010, subsequent to retirement, when attempt to correct this condition failed - Heart condition was, per the record, a disability that matured subsequent to retirement in 2009.

Benoit v. Everett Retirement Bd., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Denial of accidental disability retirement application without convening medical panel - Psychological or emotional injury - Accountant IV/Financial Analyst - Alleged stress and anxiety due to workplace environment and staff retaliation for "whistleblowing" - Failure to articulate mental or emotional injury arising out of bona fide personnel action, or intentional infliction of emotional harm - Independent medical review for workmen's compensation review performed by psychiatrist negative as to psychiatric condition causally-related to event or events at workplace - No medical record support for work-related emotional injury.

Manning v. State Bd. of Retirement, Docket No. CR-12-325, Decision (Mass. Div. of Admin. Law App., Apr. 29, 2016).

Initial medical panel review denied - Municipal police chief - Hypertension and knee injury - Nonspecific date of alleged disability - Return to work following alleged disability - Ineligibility for accidental disability retirement benefits - Legal pointlessness of medical panel review.

Holland v. Malden Retirement Bd., Docket No. CR-13-538, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

Entitlement to Review by New Medical Panel

New medical panel granted - Aggravation of pre-existing injury (knee osteoarthritis) - Public works department laborer - Knee injury (twisting and medial meniscus tear) sustained on the job - Unanimous negative panel finding as to causation - Medical panel error requiring examination by new panel - Plainly wrong conclusion and application of incorrect standard - Attribution of injury to weight and deconditioning without medical record support - Unreasonable expectation that weight loss and strength training would allow performance of essential job duties despite ineffectiveness of post-injury physical therapy.

Cayo v. West Springfield Retirement Bd., Docket No. CR-15-468, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

New medical panel denied, and denial of accidental disability retirement application affirmed - Insufficient evidence of disability - District Attorney support staff at district court performing data entry, document scanning and duplication, case file preparation, general office and administrative support work - Right arm strain/frozen shoulder syndrome/rotator cuff tear while organizing file cabinet - Improved range of motion and decrease in pain level following rotator cuff surgery - Unanimous negative certificate as to disability by medical panel (2 orthopedic surgeons, one pain management physician) - No evidence that panel applied erroneous standard or lacked pertinent facts - Panel examination revealed modest range of motion loss in arm and shoulder - Medical records showed no large rotator cuff tears or post-surgical lifting requirements - Insignificant omissions from records given to medical panel members - Omissive job description describing receptionist's position without mentioning file management responsibility countered by employee's full description of duties to panel members, including frequently lifting and carrying files weighing 10-15 pounds, and panel's evaluation of file weight and range of motion needed to carry and lift files - Sufficient basis in medical records reviewed, and from employee's responses to questions during panel's examination, from which panel members could conclude that surgery had helped her despite lacking operative report - Panel's unchanged opinion following subsequent review of missing documents supplied by retirement board - No showing that further examination by medical panel would have provided new information material to disability.

Henry (Donna) v. State Bd. of Retirement, Docket No. CR-14-530, Decision (Mass. Div. of Admin. Law App., Oct. 21, 2016).

New medical panel denied - Municipal firefighter - Fall from ladder during firefighting emergency - Left ankle sprain and left hand sprain that healed, and left

knee contusion, with continued pain following arthroscopy - Split medical panel finding leaving no affirmative panel majority as to disability's job-related causation - No evidence that panel members failed to consider pertinent facts, applied erroneous standard in determining issues of disability, its permanence, or likelihood of its job-related causation, or made clearly wrong findings based upon what medical records showed.

Rodriguez v. Springfield Retirement Bd., Docket No. CR-15-216, Decision (Mass. Div. of Admin. Law App., Jan. 13, 2017).

New medical panel granted - Middle school paraprofessional - Disabling lower back injury following assault by special needs student - Pre-existing condition (degenerative disc disease, spinal stenosis and gradually-developing facet arthritis) - Asymptomatic and able to perform job duties prior to work-related injury - Majority negative panel certificate as to job-related causation - Failure to evaluate impact of assault on pre-existing condition - New medical panel needed to fully assess aggravation issue.

Bernier v. Hampden County Regional Retirement System, Docket No. CR-15-555, Decision (Mass. Div. of Admin. Law App., Jan. 13, 2017).

—Panel Findings - Affirmative as to Disability, Permanence, Job-Related Causation

Majority Affirmative Panel

Majority affirmative panel finding as to causation found unpersuasive - Public school teacher - Aggravation of pre-existing injury (depression and anxiety longstanding since childhood) after 20 years of successful teaching with the aid of psychotherapy and prescribed psychiatric medication - Increasing anxiety about ability to perform classroom duties, meet deadlines and attend to student progress or lack of progress - Development of hair and weight loss, and hoarding and eating disorders, and worsening inability to concentrate, loss of organizational skills, and forgetful, incoherent thought, observed by treating psychiatrist - Attribution to difficult work environment at school, particularly difficult students, increasing administrative work load, and arrival of a new, critical and unsupportive principal - Teacher's transfer to new school with supportive principal, with resulting, but temporary, diminishment of anxiety and restored level of function as teacher - Resumption, and worsening, of psychiatric symptoms for five years following teacher's transfer - Affirmative certificate by psychiatric medical panel majority as to disability, permanence and causation - Rejection by Board following hearing, based upon minority panel member's rejection of work-related causation, for lack of specific traumatic at-work events, and opinion that natural progression of anxiety disorder, rather than work-

related injury, caused increasing difficulty in managing job duties and, ultimately, the teacher's disability - Failure to prove work-related causation by preponderance of evidence - Affirmative medical panel findings as to causation not conclusive - No evidence of work-related event or series of events contributing significantly to teacher's psychiatric disability - Evidence supported underlying anxiety about job duties, rather than conditions of job, as the significant factor precipitating teacher's disability.

Milton v. Boston Retirement Bd., Docket No. CR-14-19, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017)

Orthopedic medical panel - Majority affirmative panel certificate as to causation - Entitlement to great weight - Principal clerk at municipal senior center - Preexisting injury (chronic left foot conditions and injuries treated previously by surgery) aggravated by work injury sustained in performance of job duties (fall in medical equipment shed while putting away wheelchair and commode, causing left foot to become jammed in wheelchair wheel) - Following injury, unresolving left foot reflex sympathetic dystrophy syndrome, intensifying left foot pain, marked changes in foot temperature, and need to use cane for ambulating - No evidence panel majority applied incorrect standard, lacked pertinent medical facts, or engaged in procedural irregularities in reaching conclusion as to causation - Panel conclusion as to causation consistent with opinions of independent medical examiners and treating physicians that unresolving left-foot symptoms related to, and were likely exacerbated by, work injury in question - Medical evidence in record confirmed that left foot symptoms worsened to point of disability and would not resolve over time.

Collari v. Marlborough Retirement Bd., Docket No. CR-15-179, Decision (Mass. Div. of Admin. Law App., Sept. 9, 2016).

Affirmative majority medical panel opinion as to job-related causation - Some evidence as to causation, but not conclusive as to this issue - Nursing assistant - Disabling lower back injury sustained while transferring patient from chair to bed during work shift - Affirmative majority panel opinion sufficient to sustain employee's burden of proof as to causation, together with other proof presented: treating physicians' supporting opinions; employee's credible testimony as to incident in question and immediacy of lower back symptoms; no evidence in medical records of prior back problems or inability to perform job duties, despite pre-existing obesity.

Cobb v. State Bd. of Retirement, Docket No. CR-14-367, Decision (Mass. Div. of Admin. Law App., Feb. 3, 2017).

Unanimous Affirmative Panel

Unanimous affirmative panel finding as to causation found unpersuasive as to work-related causation - Correction officer - Post-traumatic stress disorder, depression and anxiety as a result of incidents witnessed and experienced directly as correction officer during two years of employment as correction officer - Decreased sleep and appetite, recurrent intrusive thoughts, and drinking after witnessing incidents between inmates - Tightness, chest pains, and arm pain after speaking with inmate outside his cell - Major depressive disorder and panic attack diagnosed by treating physicians - Unanimous affirmative psychiatric medical panel certificate as to disability, its likely permanence, and job-related causation - Retirement board denial of accidental disability retirement application despite panel certificate based upon lack of specific dates of injury due to inmate violence, and assertion of stress and trauma based in part upon allegations of injury to other correction officers that employee did not witness - Denial affirmed - Affirmative medical panel certificate not conclusive as to work-related causation - Injuries to third parties (including suicides and suicide attempts among correction officers) insufficient to show compensable personal injury - Credibility issues - Failure to file incident reports as to violence witnessed - Discrepancies in narratives of alleged violence at correctional facility given to physicians, including apparent conflation of memories with alleged reports of co-workers - Presence at related incidents, or even being on duty at time, not documented by incident reports filed by others - Insufficient evidence of specific events that could serve as basis for accidental disability retirement application - No evidence of work environment different from those in which other correction officers worked - No evidence of outrageous working conditions in comparison with work other correction officers in facility performed - No evidence of work-related aggravation of pre-existing psychiatric condition, including depression related to childhood abuse, that appeared to have become clinically quiescent before correction officer employment began, particularly since employee did not followup with psychotherapy or trauma therapy recommended by treating physician and therefore could not show that treatment could not have resolved anxiety, depression and post-traumatic stress disorder - No workmen's compensation benefits awarded for any of the alleged work-related incidents - Receipt of lump-sum workmen's compensation benefit payment by agreement evidence of legal compromise only, not merits-based resolution of claim.

Gale v. State Bd. of Retirement, Docket No. CR-13-205, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Probation case specialist with clerical and secretarial duties - Post-traumatic stress disorder (PTSD) allegedly caused by humiliation of having to meet with supervisors regarding unfair accusations, unfair targeting and discipline, and unkind and unequal treatment by supervisors and co-workers - Termination following alleged sick leave

abuse, excessive personal use of work email, and conflicts with supervisor and co-workers - Insufficient evidence of causation - Unanimous affirmative certificate by medical panel (2 psychiatrists and 1 neurologist) as to disability (extreme anxiety), permanence and causation that alleged incidents in workplace caused PTSD - Not dispositive as to causation - No showing that supervisors did not engage in bona fide personnel actions - No showing that alleged workplace ill will, job conflicts, and arguments with superiors and co-workers that generated feelings of persecution and unfair treatment comprised an identifiable condition not common or necessary to a great many occupations.

Sinopoli v. State Bd. of Retirement, Docket No. CR-15-223, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

—Panel Findings - Negative as to Disability, Permanence, Job-Related Causation

Majority Negative Panel

Medical panel's negative response to any of the three questions posed to it (as to disability, its permanence and job-related causation) precludes allowing accidental disability retirement benefits application unless panel applied erroneous standard, failed to follow the proper procedure, or its decision is plainly wrong.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Applicant appealing denial of application for accidental disability retirement benefits had burden of proving, by preponderance of the evidence, that Board improperly denied application on basis of invalid medical panel certificate.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Medical panel not required to agree with opinions of other physicians - That panel majority's negative findings as to permanence of disability did not agree with findings or opinions of other physicians who examined accidental disability retirement applicant did not show that panel members used erroneous standard in reaching their conclusions.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

School cafeteria helper - Upper right extremity injury sustained while lifting tray of pasta from oven rack above eye level - Orthopedic medical panel - Majority negative panel answer as to permanence of disability - Applicant's contention that panel members improperly focused on neck rather than shoulder pain contradicted by her accidental disability retirement application, which claimed both neck and shoulder pain resulting from work-related injury, and by her complaints of neck pain to treating physicians, and the histories she gave them regarding her neck injury - Panel member who found neck injury disabling but not permanent correctly considered value of future physical therapy in reaching this conclusion - Applicant's failure to show that panel members lacked pertinent information or applied erroneous standard - Retirement Board's decision denying accidental disability retirement application based upon majority negative medical panel as to permanence of disability affirmed.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Unanimous Negative Panel

Insufficient evidence of disability - Maintenance worker at correctional facility - Ankle sprain while spreading ice melt and sand on correctional facility steps - Return to work with varying degrees of foot pain, and ankle pain and stiffness, and ability to run, walk and stand - Varying diagnoses of treating physicians, including adult acquired flatfoot deformity - without finding of permanent work-related disability or of worker having reached an end result in terms of treatment or ability to continue work with limitations on standing or use of supportive footwear - No imaging studies showing bone fracture - Whole body bone scan three years after injury showed degenerative changes in ankles and mid-feet - Worker performed duties at work for eight months before resigning from job - No evidence that worker was totally and permanently disabled on last day of work, which was four years after injury - Some evidence that worker argued with supervisor before resigning - Unanimous negative medical panel as to disability from performing essential job duties - No evidence panel members lacked pertinent facts including worker's job description and medical records or applied erroneous standards, or that conclusion as to lack of disability was plainly wrong - No entitlement to review by new medical panel.

MacGeachey v. State Bd. of Retirement, Docket Nos. CR-13-403, CR-16-220, Decision (Mass. Div. of Admin. Law App., Apr. 21, 2017).

Certified nursing assistant - Back and neck injury sustained during nursing home patient transfer from chair to bed - Claimed disability due to cervical spine disc herniation - Alleged exacerbation of pre-existing degenerative changes in cervical and

lumbosacral spine (hip arthritis and cervical radiculopathy) - Medical record evidence that work-related injury resolved significantly - Clearance for return to work preceded termination for failure to return to work - Unanimous negative certificate by orthopedic medical panel as to disability, its permanence, and work injury-related causation - No evidence that panel members employed erroneous medical standard or lacked pertinent facts in reaching their conclusions.

Asare v. Taunton Retirement Bd., Docket No. CR-12-445, Decision (Mass. Div. of Admin. Law App., May 5, 2016).

—Procedural Requirements

Notice of Injury to Retirement Board Within 90 Days Following Injury or Hazard Undergone

Summary decision sustaining denial of accidental disability retirement - Psychological or emotional injury - Police chief - Harassment by selectmen - Stress and depression - Absence of genuine or material factual issue - Injury not sustained within two years prior to accidental disability retirement application - Failure to file written notice of injury within 90 days after its occurrence.

Ackerman v. Worcester Regional Retirement Bd., Docket No. CR-11-405, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

No evidence of written notice of injury to retirement board within 90 days following injury or hazard undergone - Notice period not tolled by receipt of workmen's compensation payments for disabling injury claimed - No evidence of receipt of workmen's compensation payments - Steam fireman at state college - claimed work-related exposure to natural gas fumes following third party's gas line installation, and, during emergency room visit that followed, injury to hand during blood draw - Accidental disability retirement benefits also denied for insufficient proof of causation, including failure to obtain a supporting affirmative certificate from medical panel.

Maillet v. State Bd. of Retirement, Docket No. CR-13-327, Decision (Mass. Div. of Admin. Law App., June 3, 2016).

Untimely notice of injury to retirement board - Notice period not tolled - Group 4 police officer - Post-traumatic stress disorder, major depression and panic disorder - Absence of workers' compensation-related tolling of notice period - Group 4 police officers ineligible for workers' compensation - No evidence of mental health

problems within two years preceding accidental disability retirement application - Failure to get along with co-workers and superiors not so uncommon as to be “identifiable condition” leading to disability - Accidental disability retirement benefits denial affirmed.

Rosario v. Fall River Retirement Bd., Docket No. CR-13-233, Decision (Mass. Div. of Admin. Law App., Apr. 15, 2016).

Failure to give notice of injury to retirement board - No evidence of injury while in performance of employee’s duties within two years of filing accidental disability retirement application - Accidental disability retirement benefits denial affirmed.

Simproux v. Cambridge Retirement Bd., Docket No. CR-14-770, Decision (Mass. Div. of Admin. Law App., Mar. 25, 2016).

Occurrence of Injury or Hazard Undergone More Than Two Years Prior to Accidental Disability Retirement Application

Retirement system member’s injuries or hazard undergone on job that occurred more than two years before date on which application for accidental disability retirement was filed are not considered in evaluating application unless written notice was provided to member’s retirement board (*see* M.G.L. c. 32, § 7(1)) or if exception applies under M.G.L. c. 32, § 7(3)(a) and (b).

Benoit v. Everett Retirement Bd., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Retired firefighter - Accidental disability retirement application filed October 21, 2013, subsequent to superannuation retirement in April 2009 - Claimed “heart presumption” for firefighters (M.G.L. c. 32, § 94) and history of atrial fibrillation as “hazard undergone” - No notice of injury filed with retirement board as to asserted heart-related injury (palpitations and chest pain experienced while climbing stairs during response to house fire in 2006, five years prior to filing of accidental disability retirement application) - No mention of these symptoms or of firefighters’ on-site evaluation by EMTs in incident report regarding this fire - No notice of injury filed regarding cardiac event in May 2007 - Hospital records reported history of hypertension, but electrocardiogram following 2007 event showed no atrial fibrillation - Firefighter declined hospitalization and signed himself out of hospital against medical advice - No workers’ compensation-related exception to failure to file written notice of injury because firefighters, as Group 4 members, are not eligible to receive workers’ compensation - Exception to notice of injury requirement based upon record of injury sustained on file in fire department’s official records

inapplicable as claimant produced no such record - Atrial fibrillation diagnosed on January 9, 2009 (prior to superannuation retirement), but followup EKG on January 29, 2009 showed regular heart rate and no atrial fibrillation, and firefighter was cleared to return to work - No treatment for atrial fibrillation until May 2010, subsequent to retirement, when attempt to correct this condition failed - Heart condition was, per the record, a disability that matured subsequent to retirement in 2009 - Application for accidental disability retirement properly denied without convening medical panel.

Benoit v. Everett Retirement Bd., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Failure to submit accidental disability retirement application within two years (following events at school where teacher worked before transferring, allegedly causing exacerbation of pre-existing anxiety and depression), with no workmen's compensation payments to mitigate lapse of time, violated timely application provisions of M.G.L. c. 32, §§ 7(1) and 7(3)(a) - denial of accidental disability retirement application affirmed on this ground and for failure to prove by preponderance of evidence that teacher's psychiatric disability was due to a work-related injury.

Milton v. Boston Retirement Bd., Docket No. CR-14-19, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017)

Summary decision sustaining denial of accidental disability retirement - Claimed psychological or emotional injury - Police chief - Harassment by selectmen - Stress and depression - Absence of genuine or material factual issue - Injury not sustained within two years prior to accidental disability retirement application - Failure to file written notice of injury within 90 days after its occurrence.

Ackerman v. Worcester Regional Retirement Bd., Docket No. CR-11-405, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

Steam fireman at state college - claimed work-related exposure to natural gas fumes following third party's gas line installation, and, during emergency room visit that followed, injury to hand during blood draw - Injuries alleged to have caused disability occurred more than two years prior to accidental disability retirement application - Accidental disability retirement benefits also denied for insufficient proof of causation, including failure to obtain a supporting affirmative certificate from medical panel.

Maillet v. State Bd. of Retirement, Docket No. CR-13-327, Decision (Mass. Div. of Admin. Law App., June 3, 2016).

—Psychological or Emotional Injury

Generally

Applicant asserting disability retirement benefits due to emotional condition - Burden of proof - Grounds for accidental disability retirement benefits - Sustained psychological or emotional injury based on single incident or series of incidents - Injury was result of exposure to identifiable condition, or that employment presented a hazard, that is not common and necessary to all or a great many occupations.

O'Connor v. State Bd. of Retirement, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Some degree of workplace ill will is all too common in many occupations.

O'Connor v. State Bd. of Retirement, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Emotional suffering resulting from petitioner's inability to get along with co-workers, or their inability to get along with her, does not alone suffice to show a compensable work injury.

O'Connor v. State Bd. of Retirement, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Insufficient Proof; Accidental Disability Retirement Benefits Denied

Registry of Motor Vehicles Clerk IV - Alleged harassment and retaliation by RMV branch office staff from 1996 through 2010 - Claim of permanent disability based upon exposure to identifiable condition (constant workplace hostility and harassment) - Conflicts with co-workers and state trooper assigned to branch office - One-day suspension in 2000 for unprofessional conduct toward customer - Discipline overturned following grievance through union - Second suspension, for three-days, issued for directing customer to return unnecessarily to automobile insurer to correct registration error made by another RMV clerk - Loud, harsh and public verbal reprimand heard by fellow employees and by customers issued by supervisor - Suspension overturned following grievance - One-day suspension in 2001 for allegedly failing to assist another staffmember while on shift - Perception of being targeted for discipline not meted out to other staff - Employee entered comments about years of harassment, rude treatment and interference with job performance other staff and by management in response to FY 2002 employee performance review form - Management failure in late 2002 to respond to request to

take personal day, and marked off-payroll, followed by grievance and attendance correction and reinstatement of pay - 2005 transfer to another RM, followed by three-day suspension for refusal to assist customers, refusal to process transaction for drive-up customer, damage to customer's car caused by opening emergency exit into customer drive-through area, a violation of branch rules, and other violations - Suspension rescinded following hearing - Transferred to another RMV branch in 2005, along with former supervisor - Perception that work environment at new branch was hostile - In March 2009, after questioning elderly customer about identification and medical support for handicap placard application, conflict with co-worker as to why she did not simply give the customer the placard, in view of her age - Manager sided with co-worker, prompting employee to complain of hostile treatment and working conditions - Subsequent verbal altercation, in July 2009, with co-worker upset about her work load, who told employee to mind her own business, called employee "stupid and crazy" and threatened to "kick [her] ass" - Co-worker not disciplined - Employee's request for transfer to a different RMV branch based on hostile work environment denied - Continued hostility by same co-worker, this time with racial overtones - Employee fainted at work in July 2009, believed she was kicked when she was on floor, and was taken to hospital - After returning to work several days later, perception that other workers were trying to get rid of her - Employee filed complaint with union about workplace hostility in August 2009 - Conclusion by RMV counsel that employee had provoked the initial bickering with co-worker - Employee given written warning about her confrontational and volatile behavior, and then, in January 2010, after being overheard making comments about wanting to punch co-worker and give others what they deserved, placed on paid administrative leave pending determination as to whether she posed a danger to herself and others in workplace - Subsequent negative psychological fitness-for-duty evaluation, with examining physician's recommendation of intensive psychopharmacological and psychotherapeutic treatment prior to returning to work and re-evaluation, along with recommendation of occupational therapy to assist employee with workplace relations and working cooperatively with co-workers - Subsequent counseling and treatment generated diagnosis of serious mental illness including major depression, insomnia, low energy and anxiety - Dismissal from behavioral health treatment program due to conflict with another patient - Accidental disability retirement application filed in March 2011 based upon permanent disability due to severe depression, stress, anxiety and PTSD due to workplace harassment and retaliation - Unanimous affirmative medical panel certificate as to disability, permanence and work-related causation (identified by all three panel members as a series of work-related events) - Retirement Board approved ordinary disability retirement but denied accidental disability retirement application, despite unanimous affirmative panel certificate - Denial sustained - Neither employee nor her superiors filed any notice of injury between 1997 and 2010 despite allegations of continuing harassment - Employee's credibility as to continuing nature of alleged harassment, and reliability of her recollection of events suspect, on account of perceived constant fabrications and "set-ups" in five RMV branches over 13 years, with almost no

supporting contemporaneous entries in medical records, and without any witness corroboration of employee's self-serving testimony - No evidence supporting claim of career-long exposure to workplace hazards - No identifiable condition not common and necessary to all or a great many occupations - No showing that alleged injury amounted to more than personal feelings of persecution and perpetual victimization.

O'Connor v. State Bd. of Retirement, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Probation case specialist with clerical and secretarial duties - Post-traumatic stress disorder (PTSD) allegedly caused by humiliation of having to meet with supervisors regarding unfair accusations against her, unfair targeting and discipline, and unkind and unequal treatment by supervisors and co-workers - Termination following alleged sick leave abuse, excessive personal use of work email, and conflicts with supervisor and co-workers - Insufficient evidence of causation - Unanimous affirmative certificate by medical panel (2 psychiatrists and 1 neurologist) as to disability (extreme anxiety), permanence and causation that alleged incidents in workplace caused PTSD not dispositive as to causation - No showing that supervisors did not engage in bona fide personnel actions - No showing that alleged workplace ill will, job conflicts and arguments with superiors and co-workers that generated feelings of persecution and unfair treatment was an identifiable condition not common or necessary to a great many occupations.

Sinopoli v. State Bd. of Retirement, Docket No. CR-15-223, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

Group 4 police officer - Alleged post-traumatic stress disorder, major depression and panic disorder - Notice of Injury and tolling of notice period - Untimely notice - No workers' compensation-related tolling - Group 4 police officers ineligible for workers' compensation - No evidence of mental health problems within two years preceding accidental disability retirement application - Failure to get along with co-workers and superiors not so uncommon as to be "identifiable condition" leading to disability - Accidental disability retirement benefits denial affirmed.

Rosario v. Fall River Retirement Bd., Docket No. CR-13-233, Decision (Mass. Div. of Admin. Law App., Apr. 15, 2016).

Accountant IV/Financial Analyst - Alleged stress and anxiety due to workplace environment and staff retaliation for "whistleblowing" - Denial without convening medical panel - Failure to articulate mental or emotional injury arising out of bona

fide personnel action, or intentional infliction of emotional harm - Independent medical review for workmen's compensation review performed by psychiatrist negative as to psychiatric condition causally-related to event or events at workplace - No medical record support for work-related emotional injury claimed.

Manning v. State Bd. of Retirement, Docket No. CR-12-325, Decision (Mass. Div. of Admin. Law App., Apr. 29, 2016).

Special education and bilingual teacher - Aggravation of pre-existing mental condition (bipolar affective disorder) by work stress, to point of disability - Ongoing harassment by staff and administration (demotion from educational team facilitator position, assignment of additional work duties, required overtime, unfavorable evaluation, reprimands, disciplinary hearing) - Insufficient evidence - Unanimous certificate of medical panel (2 psychiatrists, 1 neurologist), erroneously checked off on certificate as "yes" answer as to work-related causation, actually negative based upon opinion that natural progression of pre-existing bipolar affective disorder, rather than work-related aggravation of pre-existing condition, more likely made the teacher unable to perform job duties (due to inability to organize thoughts, leading to inability to plan, organize, and assimilate evaluations) - Teacher's testimony lacked organization or specificity as to details and dates of alleged harassment, despite representation by experienced counsel and magistrate's direction to better organize the testimony - Inference from teacher's disorganized, rambling testimony that opinions of treating physicians who opined favorably as to work-related causation, none of whom testified, were based upon similarly disorganized statements to them by teacher, and that opinions therefore lacked sufficient factual foundation to be reliable.

Ibanez v. Boston Retirement Bd., Docket No. CR-13-386, Decision (Mass. Div. of Admin. Law App., May 13, 2016).

Sufficient Proof; Accidental Disability Retirement Benefits Granted

—Statutory Presumptions

Cancer Presumption

Heart Law Presumption

Retired firefighter - Accidental disability retirement application filed October 21, 2013, subsequent to superannuation retirement in April 2009 - Claimed “heart presumption” for firefighters (M.G.L. c. 32, § 94) and history of atrial fibrillation as “hazard undergone” - No notice of injury filed with retirement board as to asserted heart-related injury (palpitations and chest pain experienced while climbing stairs during response to house fire in 2006, five years prior to filing of accidental disability retirement application) - No mention of these symptoms or of firefighters’ on-site evaluation by EMTs in incident report regarding this fire - No notice of injury filed regarding cardiac event in May 2007 - Hospital records reported history of hypertension, but electrocardiogram following 2007 event showed no atrial fibrillation - Firefighter declined hospitalization and signed himself out of hospital against medical advice - No workers’ compensation-related exception to failure to file written notice of injury because firefighters, as Group 4 members, are not eligible to receive workers’ compensation - Exception to notice of injury requirement based upon record of injury sustained on file in fire department’s official records inapplicable as claimant produced no such record - Atrial fibrillation diagnosed on January 9, 2009 (prior to superannuation retirement), but followup EKG on January 29, 2009 showed regular heart rate and no atrial fibrillation, and firefighter was cleared to return to work - No treatment for atrial fibrillation until May 2010, subsequent to retirement, when attempt to correct this condition failed - Heart condition was, per the record, a disability that matured subsequent to retirement in 2009 - Application for accidental disability retirement properly denied without convening medical panel.

Benoit v. Everett Retirement Bd., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Heart law (M.G.L. c. 32, § 94) creates presumption that when full-time police officer or firefighter is disabled as a result of a heart condition or hypertension, disability is related causally to firefighter’s job - Presumption reflects view of heart disease and hypertension as long-term illnesses that can be exacerbated by the stress of working as a police officer or firefighter - If applicable, heart law presumption satisfies one of the three prerequisites for accidental disability retirement—a proximate, work-related cause for a retirement system member’s incapacity—and makes it unnecessary for the retirement system member to prove the causal connection any further.

Foley v. Milton Retirement System, Docket No. CR-15-118, Decision (Mass. Div.

of Admin. Law App., May 27, 2016).

Heart law presumption is not conclusive and may be rebutted by competent evidence that (1) the disabling heart disease or heart condition was not suffered in the line of duty; or (2) although he suffered from hypertension, a police officer or firefighter was not retired on account of a hypertension-related disability, or was not totally incapacitated from performing the essential duties of his job when he retired.

Foley v. Milton Retirement System, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Competent evidence rebutting heart law presumption may include finding of majority of medical panel members that hypertension or heart disease was not incapacitating.

Foley v. Milton Retirement System, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Former deputy fire chief applying for accidental disability retirement based upon job-related hypertension - Heart law presumption - Applicability - Required showing: (a) Successfully passing physical examination upon entry into fire department or subsequently, with examination revealing no evidence of condition of health impairment caused by hypertension; and (b) Disability as a result of hypertension before retiring.

Foley v. Milton Retirement System, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Retired deputy fire chief - Application for accidental disability retirement based upon job-related hypertension - Denial of application sustained - Heart law presumption inapplicable even though deputy fire chief suffered from hypertension exacerbated by stress - Failure to report any hypertension-related injury or request leave on account of hypertension before retiring - Majority of the three-cardiologist medical panel opinion, after examining deputy fire chief, that he was not physically incapable of performing his essential job duties - No dispute that the panel's composition was proper or that panel members reviewed official description of the deputy fire chief's essential job duties or his medical records - No evidence that panel majority employed incorrect standard in determining that he was not disabled.

Foley v. Milton Retirement System, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Beneficiaries of Retirement Contributions

—Benefits

Limitations, Overpayments, and Discretionary Waiver of Recoupment or Repayment

Member-survivor benefits (M.G.L. c. 32, § 12(2)(d)) - Statutory limitation of initial annual benefit amount to deceased retirement system member's actual salary at time of death (M.G.L. c. 32, § 12(2)(d), last para.) - Exception to statute's general rule that monthly survivor benefits to spouse of deceased retirement system member not be less than \$250 or \$500, whichever applied - Town clerk receiving \$1,550 annual salary upon death in April 2000 - Surviving spouse's annual benefit amount erroneously based upon \$3,000 statutory minimum retirement amount (\$250 per month) rather than decedent's \$1,550 annual salary - Resulting overpayment of member-survivor benefits over ten-year period (\$20,310.71) subject to recoupment absent waiver pursuant to M.G.L. c. 32, § 20(5)(c)(3) - Discretionary denial of waiver request - No abuse of retirement board's discretion, even though overpayment resulted from retirement board error in calculating surviving spouse's annual member-survivor benefit amount - Board's benefit reduction and/or request for repayment based solely upon statutory limitation - No allegation or evidence of arbitrary or capricious action by retirement board in denying waiver.

Randall v. Franklin County Retirement Bd., Docket No. CR-12-277, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017)

—Designation of Beneficiary

Former Spouse

Defective designation of retirement contributions beneficiary by deceased retiree - No witness signature - Proportion of benefits payable to beneficiary left blank - Omissions fatal to beneficiary designation - Entire retirement account payable to decedent's estate.

Fritz-Elliot v. State Bd. of Retirement, Docket No. CR-14-368, Decision (Mass. Div. of Admin. Law App., Apr. 22, 2016).

Buyback of Previously-Refunded Retirement Contributions

Restoration to state service after leaving prior state position - Purchase of previously-refunded retirement contributions - Failure to timely exercise buyback option at lower

interest rate - Higher actuarially-assumed interest rate applies.

England v. State Bd. of Retirement, Docket No. CR-14-18, Decision (Mass. Div. of Admin. Law App., Dec. 2, 2016).

Restoration to state service after leaving prior state position - Installment agreement - Default (failure to make buyback installment payments) - Prevailing actuarial interest rate applicable to new buyback arrangement.

Maddox v. Massachusetts Teachers' Retirement System, Docket No. CR-15-301, Decision (Mass. Div. of Admin. Law App., Nov. 2, 2016).

Computation of Retirement Benefits

—Benefits to Former Spouse Under Domestic Relations Order (DRO) or Qualified Domestic Relations Order (QDRO)

Retired teacher divorced before retirement - Former husband's marital portion of teacher's pension - Marital settlement agreement incorporated but not merged into court's divorce decree, and confirmed by Qualified Domestic Relations Order issued by Kent County (Rhode Island) Family Court - Provision requiring that teacher receive pension benefits under retirement Option C, with option to select benefits under retirement Option B if former husband "has not remarried" at time of teacher's retirement, with balance of former husband's interest in net equity of marital home to be paid through equitable allocation of her pension - Before teacher retired, former husband remarried and later divorced his second wife - Retirement System denied teacher's election of Option B based upon former husband's remarriage - Phrase "has not remarried" in marital settlement agreement and QDRO not equivalent of "has never remarried" - Per plain language of QDRO, teacher's obligation to select retirement Option C, and ability to select Option B instead, was based upon former husband's marital status when she retired (which was "divorced"), and not before her retirement - Relief from obligation to select retirement option C based upon former husband's "remarried" status before, but not when, she retired, needed to be sought by petitioning the Rhode Island Family Court, which retained jurisdiction over the QDRO - Retirement System's decision requiring that teacher select Option C upon retiring affirmed.

Mason v. Massachusetts Teachers' Retirement System, Docket No. CR-16-200, Decision (Mass. Div. of Admin. Law App., May 26, 2017).

Monthly retirement benefit allocation payment to former spouse under DRO - Subsequent DRO reducing payment amount - Retirement Board bound by DRO -

Board's refusal to reinstate higher retirement benefit allocation under prior DRO was decision or action appealable to DALA under M.G.L. c. 32, § 16(4), if only for determination that latest DRO bound the Board to reduce former spouse's benefit payment and confirm exhaustion of remedies under retirement statute - Relief regarding reduced benefit amount ordered by DRO, if available, must be sought from Probate and Family Court.

Creedon v. Lexington Retirement Bd., Docket No. CR-15-662, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2016).

QDRO directing computation of ex-spouse's retirement benefit share as if employment ended at time of divorce - Employment group classification at time of divorce, not at later time of statutory group classification change, applies during computation of ex-spouse's retirement benefit share.

Holland v. Boston Retirement Bd., Docket No. CR-13-13, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

—Regular Compensation - Service or Amounts Included

Teachers - Payment for work performed as summer school director - summer program "meaningfully related to the regular school experience."

Fay v. Massachusetts Teachers' Retirement System, Docket No. CR-11-770, Decision (Mass. Div. of Admin. Law App., Nov. 25, 2016).

Prior periods of contract service to state agencies purchased pursuant to M.G.L. c. 32, § 4(1) - Sufficiently permanent and regular service not paid out of "03" subsidiary account - Retirement board policy precluding inclusion of purchased "section 4(1)" contract service from inclusion in computing regular compensation - Policy invalid as exceeding scope of Board's Chapter 32 authority.

Young v. State Bd. of Retirement, Docket No. CR-10-749, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

—Regular Compensation - Service or Amounts Not Included

Public school superintendent - Retirement agreement following superintendent's complaint against school committee chairperson, and conflict between committee and superintendent - Retroactive pay raises for last three school years in superintendent's

position specified in agreement - Raises not performance-based increases to base salary that superintendent would have likely received following positive evaluations - Raises not intended to correct salary-payment error - Raises would not have been paid by school committee if superintendent had not agreed to retire before her contract term ended, and were thus in exchange for agreement to retire - Retroactive increases based upon employer's knowledge of superintendent's retirement, and contingent upon retirement excluded from calculation of retirement benefits - Increases properly excluded by Massachusetts Teachers' retirement system in calculating superintendent's three-year average salary for retirement purposes.

Kane v. Massachusetts Teachers' Retirement System, Docket No. CR-12-80, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

College Hockey Coach - Compensation from Season Ticket Sales and Summer Hockey Camp Revenue properly excluded from computation of salary for retirement purposes.

Mallen v. State Bd. of Retirement, Docket No. CR-10-460, Decision (Mass. Div. of Admin. Law App., Apr. 29, 2016).

Teachers and School District Administrators - Duties performed in addition to regular duties - Minuteman Regional School District - Outreach Coordinator - Payment of specific amount for additional duty provided in employment agreement - Position and payment for it not included in collective bargaining agreement between school district committee and Minuteman Faculty Association during time period in question - Payments for additional duties regular, ordinary and normal, occurring in multiple years, but not regular compensation - Additional duties were not chief responsibilities and payment for them were in accordance with employment side agreements, not per collective bargaining agreements - Exclusion of stipend for additional duties as outreach coordinator properly excluded from regular compensation used to compute retirement benefits.

Taliadouros v. Massachusetts Teachers' Retirement System, Docket No. CR-11-660, Decision (Mass. Div. of Admin. Law App., July 8, 2016).

Teachers - Enhanced Longevity Payments Due After Collective Bargaining Agreement Expired properly excluded from computation of salary for retirement purposes.

Mulcahy v. Mass. Teachers Retirement System, Docket No. CR-09-441, Summary Decision (Mass. Div. of Admin. Law App., May 6, 2016).

Teachers - Stipends paid to dean of specialized high school academy - Position and stipend not listed in collective bargaining agreement - Properly excluded from computation of salary for retirement purposes.

Siebecker v. Mass. Teachers Retirement System, Docket No. CR-14-773, Decision (Mass. Div. of Admin. Law App., May 6, 2016).

Public charter school teacher - Annual career incentive payments, in addition to base salary, for performing contract duties and remaining employed by school system - Properly excluded from computation of salary for retirement purposes.

Burke v. Teachers Retirement Bd., Docket No. CR-15-428, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

Creditable Service

—Discovery Related to Creditable Service Purchase Denial Appeal

Document Requests

Motion to compel production of documents denied - Retirement appeal - Creditable service purchase request by retired public school teacher for prior teaching at nonpublic school (Boston School for the Deaf operated by Sisters of St. Joseph) - Denial by retirement system - Teacher's eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Request by teacher to retirement system for documents regarding other system members allowed retirement credit for prior service at Boston School for the Deaf - Information beyond scope of material factual issues, notwithstanding retirement system's production of limited, redacted documents regarding members who taught previously at the School but had not worked there for ten years and did not qualify for retirement benefit from Sisters of St. Joseph Retirement Plan - No discretion under statute to allow retirement credit for prior service at School if retirement system member qualified for benefit under Retirement Plan - Order to compel production of other documents unnecessary - Retirement system produced documents and remained under continuing obligation to supplement production if it found other relevant documents.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Compel Production of Documents (Mass. Div. of Admin. Law App., May 24, 2017).

Interrogatories

Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from “any source” precluded retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Proposed interrogatories related to denial of creditable service based upon eligibility to receive retirement allowance from any source allowed as seeking relevant information - Proposed interrogatories asking whether tuition of students that teacher taught at Boston School for the Deaf was publicly funded in whole or part denied as seeking irrelevant information - Retirement credit not denied on this ground, and no claim on appeal that it was - Proposed interrogatories seeking information regarding other public school teachers allowed retirement credit for prior teaching service at Boston School for Deaf denied as seeking irrelevant information - Denial of credit for prior teaching service at nonpublic school pursuant to based upon eligibility for retirement benefit from “any source” not discretionary - Teacher allowed to pursue discovery via allowed interrogatories, and via subpoenas to successor to Retirement Plan administrator and actuary, regarding factual issues relevant to inquiry under M.G.L. c. 32, § 4(1)(p): whether she was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance.

Volpe v. Mass. Teachers’ Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Record-Keeper Subpoenas

Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from “any source” precluded retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Discovery - Proposed record-keeper subpoenas to successors to Plan administrator and actuary - Records sought regarding contributions to Plan, and payment by Plan to former teacher - Relevance to factual inquiry under M.G.L. c. 32, § 4(1)(p): whether teacher was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended

was retirement allowance - Subpoenas allowed.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017)

—Interest on Purchase (Buyback) of Creditable Service

Statutory interest rate on creditable service purchases - St. 2011, c. 176, amending M.G.L. c. 32, § 3(8)(b) - Interest rate changed from “buyback” rate of 4.25% to “actuarial assumed interest” rate of 8.25% - retirement system members wishing to preserve right to buyback certain types of service at “buyback” interest rate required to pay that rate, or enter into installment agreement to do so, before April 2, 2013 - Public school teacher - September 2004 application to purchase prior employment in school district as substitute teacher from September 1989 through June 1993- Invoice paid through rollover and installment plan, and purchase completed by February 2008 - Subsequent application in February 2013 to purchase substitute teacher service in school district from September 1993 through June 1994 - Retirement system mailed, to teacher’s home address, invoice for buyback, together with alert on the increased buyback interest rate unless she paid for buyback in full or entered into installment plan and made first payment by invoice due date (August 16, 2014) - Teacher did not receive invoice and did not pay by due date - After several inquiries, teacher received new invoice in May 2015 applying new, actuarial interest to the service buyback purchase - Retirement system denied teacher’s request to have lower buyback interest rate apply - Teacher retired October 11, 2015 - retirement system fulfilled obligations as to purchase by mailing invoice to teacher’s residential address - No obligation to confirm its receipt - Teacher failed to purchase prior service in question prior to August 16, 2014, per statutory requirement - No equitable remedy provided by M.G.L. c. 32, § 3(8)(b) or by statute amending service buyback interest rate, St. 2011, c. 176 - Denial of request to apply lower buyback interest rate provided by statute affirmed.

Lauder v. Massachusetts Teachers' Retirement System, Docket No. CR-15-303, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Waiver of Interest charges - Denial of waiver - School bus driver - Part-time field trip bus driver service rendered while not a retirement system member.

McDonough v. Quincy Retirement Bd., Docket No. CR-13-357, Decision (Mass. Div. of Admin. Law App., Nov. 9, 2016).

—Prior Service Eligible for Creditable Service Purchase

Purchase of up to four years of compensated state contract employee service in substantially-similar position prior to membership in State Employees Retirement System - Part-time contract employment - Bunker Hill Community College Learning Center monitor - Substantial similarity with permanent position to which she transferred (Bunker Hill Community College Learning Center Testing Room Coordinator) and in which position she became State Employees Retirement System Member - Eligibility to purchase prior service established by evidence - More than ten years of creditable service while retirement system member- Retirement system membership as active member in service at time of creditable service purchase request - Sufficiency of information to determine dates of prior contract service, compensation rates and hours worked despite loss or destruction of facility's employment records - W2 forms, employment request form listing pay rate, and credible testimony by applicant and co-worker.

Niven-Blowers v. State Bd. of Retirement, Docket No. CR-15-61, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

—Prior Service Ineligible for Creditable Service Purchase

Employer Funded by Federal Job-Training Programs

Service with employers funded by federal job-training programs - Insufficient proof - Employment dates and salary - Employment with Commonwealth government unit or political subdivision.

Filkins v. State Bd. of Retirement, Docket No. CR-11-715, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

Part-Time Prior Contract Service

Part time contract service prior to full-time service - community college - ineligible for purchase for retirement purposes - service not performed “immediately preceding” (within 180 days of) membership in state employees retirement system or re-entry into active service in that system - previous service as “staff assistant” not shown to be substantially service to full-time position as “associate coordinator - insufficient documentation of part-time hours worked.

Freeman (Merilee) v. State Bd. of Retirement, Docket No. CR-13-531, Decision (Mass. Div. of Admin. Law App., Jan. 27, 2017).

Prior Contract Service (M.G.L. c. 32, § 4(1)(s))

Retired Department of Mental Health (DMH) case worker, case manager and case coordinator - Application to purchase contract service at DMH between June 7, 1988 and June 24, 1989, pursuant to M.G.L. c. 32, § 4(1)(s), as employee of private contractor (Franklin/Hampshire County Community Mental Health Center, Inc.) providing mental health-related services to DMH - Payment exclusively by private contractor, before retiree and fellow Franklin/Hampshire team members became DMH employees - Not employed by DMH or by Commonwealth, and not a contract employer of DMH, during period of contract service - Not employed by “vendor functioning as instrumentality of Commonwealth,” per State Board of Retirement regulations, *see* 941 C.M.R. § 2.09(3)(c) - Vendor not a public entity established by legislature and placed within state government - Denial of application to purchase contract service affirmed.

Hogan (Jonathan) v. State Bd. of Retirement, Docket No. CR-16-243, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Juvenile Court Assistant Chief Probation Officer - Application to purchase up to four years of contract service, pursuant to M.G.L. c. 32, § 4(1)(s), with Robert F. Kennedy Children’s Action Corps (RFK), where applicant worked for eleven years prior to becoming probation officer - Private, non-profit agency that contracted with Massachusetts Department of Youth Services - Work with juvenile offenders and their families - Regular contact with juvenile probation officers in state courts - RFK employee profile showing dates of employment, full-time work throughout tenure of employment, and dates of hourly pay rate increases did not show accounts from which employee was paid or that applicant was considered to be employee of Commonwealth - Employment by third party that contracted with Commonwealth, not by department, agency, board or commission of Commonwealth, as statute requires - Retirement Board’s denial of request to purchase up to four years of contract service at RFK as creditable service affirmed.

Gibbins v. State Bd. of Retirement, Docket No. CR-14-108, Decision (Mass. Div. of Admin. Law App., May 12, 2017).

Prior Teaching Service in Non-Public School (M.G.L. c. 32, § 4(1)(p))

Public school teacher - Prior service as special education head teacher and language arts teacher at nonpublic school serving emotionally disturbed pupils aged 8-12 years - Lack of credible evidence that all of teacher’s students at private school were funded partially or fully by the Commonwealth - Denial of creditable service purchase application affirmed.

Wolfson v. Massachusetts Teachers' Retirement System, Docket No. CR-12-109, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017).

Unpaid Leave

Unpaid leave - Public school teacher - Unpaid maternity leave following paid family leave - Ineligible for credit purchase except for one month discretionary credit exception that retirement board may award.

Hackenson v. Massachusetts Teachers' Retirement System, Docket No. CR-14-94 (Mass. Div. of Admin. Law App., July 1, 2016).

Early Retirement Incentive Program (ERIP)

—Eligibility

Incorrect group 2 classification for retirement purposes - Eligibility to participate in Acts 2015, ch. 19 Early Retirement Incentive Program - Department of Public Health Registered Nurse III - Massachusetts Hospital School (Pappas Rehabilitation Hospital for Children) - Supervision by nurse manager and assistant nursing director - Work as day shift charge nurse for pediatric patients in acute care units specializing in infectious diseases, cardiology, pulmonology, neurology, physical medicine and rehabilitation, as well as dental, orthopedic, behavioral and mental health services and alternative medicine - Majority of patients in units dependent upon staff for personal care and mobility needs - Large portion of time spent consulting with hospital pharmacy staff, updating families and hospital staff as to status of patients, arranging patient transfers to other facilities, overseeing paperwork, and arranging pediatric followup - Minimal work as direct care nurse, once or twice per month - "Form 30" for position described general duties and responsibilities as supervising provision of direct nursing care and treatment to pediatric patients, assessing health and educational needs of patients and families, assisting with patient admission and discharge, and facilitating rehabilitation and supervising assigned staff, as well as supervision from registered nurse of higher grade - Regular and major duties concerned supervision, planning, and evaluating, and policy-related duties, rather than having care, custody, instruction or other supervision of mentally ill or mentally defective persons, the prerequisite for Group 2 classification - Proper classification of position for retirement purpose was Group I - Group 2 classification reversed - Board ordered to process employee's ERIP application.

Morreale v. State Bd. of Retirement, Docket No. CR-15-332, Decision (Mass. Div. of Admin. Law App., Mar. 10, 2017).

—Ineligibility

Massachusetts Department of Public Health (DPH) Healthcare Facility Specialist (Surveyor) surveying laboratories under DPH Clinical Laboratory Program monitoring compliance and providing certification and licensure under state and federal law, including Social Security Act section 1864, 42 U.S.C. § 1395aa (federal laboratory inspection program), and Clinical Laboratory Improvement Amendments of 1998 (CLIA) - Ineligibility of employee holding position to participate in Acts 2015, ch. 19 Early Retirement Incentive Program - Position funded by “federal grant monies” that were not “federal reimbursements,” as defined at M.G.L. c. 29, § 1 - Money received by Massachusetts Department of Public Health from federal government to pay for cost of inspecting laboratories to determine whether they complied with federal standards.

Abdelahad v. State Bd. of Retirement, Docket No. CR-15-292, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Group 2 classification of position by board for retirement purposes - Ineligibility to participate in Acts 2015, ch. 19 Early Retirement Incentive Program - Massachusetts Department of Public Health Recreational Therapist I - Patient Care Unit of DPH's Tewksbury Hospital - Ineligibility to participate in Early Retirement Incentive Program - Regular and major duties involving direct patient care - “Form 30” job description for recreational Therapist I position showing no required management experience or supervision of subordinate employees, and listing duties requiring that employee have care, custody, instruction or other supervision of mentally ill or mentally defective persons - Working with patients, some from Department of Developmental Services, with physical and mental disabilities, and providing them with daily activities including bowling, cooking, games, crafts and music - Assessment of individual therapeutic recreational abilities and needs, and setting individual goals and objectives for patients according to assessment - No evidence of classification in Group 1 when employment began, or classification of co-workers in same position being classified in Group I - Denial of ERIP application affirmed.

Carpenter v. State Bd. of Retirement, Docket No. CR-15-530, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Employment by non-qualifying agency - University of Massachusetts - Appeals - Dismissal - Mootness - Withdrawal of ERIP application - Expiration of ERIP application deadline.

Jochim v. State Bd. of Retirement, Docket No. CR-15-328, Decision (Mass. Div. of Admin. Law App., Oct. 28, 2016).

Group 2 classification for retirement purposes - Massachusetts Department of Mental Health Clinical Social Worker “C” - Ineligibility to participate in Early Retirement Incentive Program - Dismissal of appeal - Lack of prosecution - Failure to file prehearing memorandum and hearing exhibits, appear for hearing, or elect submission of appeal upon written filings - Statement of intention not to pursue appeal further.

Howard v. State Bd. of Retirement, Docket No. CR-15-322, Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 13, 2017).

Group Classification for Retirement Purposes

—Reclassification from Group 1 to Group 2, Generally

Classification of Commonwealth employees into Groups for retirement purposes under M.G.L. c. 32, §3(2)(g) - Classification based upon job that retirement system members has at time of retirement - Job title and job description are key information used to determine appropriate Group classification - Group 2 includes commonwealth employees “whose regular and major duties require them to have care, custody, instruction or other supervision of . . . persons who are mentally ill or mentally defective delinquents” - Reclassification - Burden of proof - Retirement system member seeking reclassification from Group 1 to Group 2 based upon direct care, custody, instruction or supervision of mentally ill or mentally retarded persons has burden of proving that her regular and major duties, or at least 51 percent of duties, during her last year of work in position in question comprised this type of work and responsibility, and cannot have been merely incidental to, or in the context of, performing some greater administrative function.

Williams v. State Bd. of Retirement, Docket No. CR-12-229, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

—Reclassification Denied - Group 1 to Group 2

Massachusetts Hospital School for disabled children - Retired Power Plant Supervisor - Position not among public safety-related jobs or others listed in statute describing group 2 (M.G.L. c. 32, § 3(2)(g))- No responsibility for custody and care of delinquents or wayward children, or of any children, at the school.

Kennefick v. State Bd. of Retirement, Docket No. CR-12-317, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017).

Department of Developmental Services Program Monitor/Program Coordinator III - Regular and major duties did not include direct care, custody, instruction or other supervision of persons who are mentally ill or defective.

Camara v. State Bd. of Retirement, Docket No. CR-15-460, Decision (Mass. Div. of Admin. Law App., Sept. 16, 2016).

Department of Children and Families (DCF) Social Worker “D” - Inapplicable statutory reclassification of DCF social workers in Group 2 - Retirement Prior to effective date of statutory reclassification.

Bombaci v. State Bd. of Retirement, Docket No. CR-11-324, Decision (Mass. Div. of Admin. Law App., June 24, 2016).

Massachusetts Hospital School - Staff Registered Nurse V and Staff Education Nurse - Regular and major duties not primarily care, custody, instruction or other supervision of mentally ill or defective persons.

Dewey v. State Bd. of Retirement, Docket No. CR-12-58, Decision (Mass. Div. of Admin. Law App., June 3, 2016).

Holyoke Soldier’s Home - Registered Nurse II - Insufficient evidence that regular and major duties required care, custody, instruction or other supervision of mentally ill or mentally defective persons - Facility provided medical rather than psychiatric care - No quantification, in classification specifications for RN II position, of number of mentally ill patients required to be in care of RN II in any single shift - No reference to care of mentally ill patients in employee performance review form.

Borucki v. State Bd. of Retirement, Docket No. CR-12-683, Decision (Mass. Div. of Admin. Law App., Apr. 22, 2016).

—Reclassification Denied - Group 1 to Group 4

Chicopee Electric Light Department - Field engineer - Group 1 classification - Review of Light Department positions by Chicopee Retirement Board to determine whether positions were classified properly - Determination that Light Department field engineer and field engineer supervisor positions should be assigned in Group 1, not Group 4 - Specification of positions included in Group 4 by M.G.L. c. 32, § 3(2)(g) - “employees of a municipal gas or electric generating or distribution plant who are employed as linemen, electric switch board operators, electric maintenance men, steam engineers, boiler operators, firemen, oilers, mechanical or maintenance men, and supervisors of said

employees who shall include managers and assistant managers” - “Field engineer” not one of positions specified by statute - Undisputed that petitioner did not supervise any Group 4 employees - Group 1 classification affirmed.

Swain v. Chicopee Retirement Bd., Docket No. CR-15-80, Decision (Mass. Div. of Admin. Law App., May 26, 2017).

—Reclassification Granted - Group 1 to Group 2

State Department of Mental Health - RN IV Infection Preventionist - Constant patient contact while providing nursing services and care to mentally ill and mentally retarded clients committed to state custody at Worcester State Hospital - No supervisory responsibility as to licensed practical nurses at facility - Work during last year of employment - 8:00 a.m. to 4:00 p.m. shift Monday through Friday included routine meeting with any patient at state hospital who presented with communicable disease or rash of unknown origin; meeting with any person prescribed anti-biotic medication, regardless of cause; assisting outside providers seeing state hospital clients including podiatrists, cardiologists and dentists, including administering EKGs and taking blood oxygen levels for cardiologists, clipping toenails and changing bandages for podiatrists, assisting with dental procedures, performing annual physicals; performing blood draws, acquiring respiration data and taking vitals; administering vaccinations during flu, pneumonia, meningitis and mumps clinics; assisting specialists with suturing in clinics, changing dressings and evacuating wounds; transporting state hospital patients to appointments with medical providers, and walking them back to their housing units after their appointments; attending one-hour, daily treatment team meetings during afternoons with individual client, facility psychiatrist, social worker, Registered Nurse, Mental Health worker and Rehabilitation Specialist; visiting 20-25 patients during remaining afternoon hours each day to perform tasks including lining space assessments, skin evaluations and assessment, and determination of patient antibiotic tolerance, with no other staff members present - First two duties listed in Form 30 general statement of duties and responsibilities were treating all patients with dignity and respect through interaction and by optimally integrating patient perspective into all aspects of care and advocating for patients, and obtaining appropriate diagnostic results and findings - Regular and major duties consisted of providing care, custody, instruction or other supervision to clients in state custody at Worcester state Hospital for at least 51 percent of the time - Administrative and supervisory duties of RN IV Infection Preventionist position were ancillary to client care, supervision and instructional functions - Denial of reclassification reversed - Remanded to state Board of Retirement to classify petitioner in Group 2 instead of Group 1.

Williams v. State Bd. of Retirement, Docket No. CR-12-229, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

State Department of Mental Retardation - Mental Retardation Specialist Supervisor - Regular and major duties required direct care to mentally ill patients - 75 percent of typical regular eight-hour shift.

O'Brien v. State Bd. of Retirement, Docket No. CR-14-721, Decision (Mass. Div. of Admin. Law App., Mar. 25, 2016).

Post-Retirement Earnings Limitations

—Exceptions

Retired teacher employed by school district based upon critical shortage of certified teachers - Boston public school headmaster - Lack of state education department waiver - Irrelevance - State Education Department regulatory waiver requirements not clearly applicable during time in question.

Kemp v. State Bd. of Retirement, Decision (Mass. Div. of Admin. Law App., Oct. 14, 2016).

Retirement Systems

—Membership

Local Retirement System

Improper termination of local retirement system membership - Termination for purpose of tabling accidental disability retirement application - Certified occupational therapist assistant employed by public school - Incorrect conclusion that employee should have been enrolled in Massachusetts Teachers' Retirement System - Employee's assistant position excluded from statutory definition of "teacher" and from membership in MTRS under that system's regulations and policy.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

Massachusetts Teachers' Retirement System

Teacher - M.G.L. c. 32, § 1 definition - Positions excluded from definition - "Assistant" position that involves some teaching but is not a full-fledged teaching position licensed by state Department of Education (or successor Department of

Elementary and Secondary Education), such as teaching assistant, research assistant, tutor, instructor, instructional aide, or certified occupational therapist assistant.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

Massachusetts Teachers' Retirement System membership - Membership based upon criteria specified by MTRS regulation, 807 C.M.R. § 4.02(1) (contractual agreement with school committee or board requiring not less than half-time service, and holding certificate granted by board of education or granted waiver pending certification by board of education), or upon MTRS administrative policy accepting, as MTRS members, occupational therapists licensed by Board of Allied Health Professionals but not by state education department, and employed by Massachusetts public schools - Policy exception inapplicable to certified occupational therapist assistant who worked in public school but was not licensed or employed formally as occupational therapist, performed under occupational therapist's supervision, and performed work similar to that of teaching or research assistant, tutor, instructor, or other person who did not meet statutory definition of "teacher."

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

Prior erroneous enrollment of persons holding assistant positions in Massachusetts Teachers' Retirement System - MTRS not bound to continue erroneous enrollment - Correction of error mandated by M.G.L. c. 32, § 20(5) - MTRS not estopped from declining to enroll others holding assistant positions, such as certified occupational therapist assistants.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

—Rescission, Revocation or Termination of Membership

Improper termination of local retirement system membership - Termination for purpose of tabling accidental disability retirement application - Certified occupational therapist assistant employed by public school - Incorrect conclusion that employee should have been enrolled in Massachusetts Teachers' Retirement System - Employee's assistant position excluded from statutory definition of "teacher" and from membership in MTRS under that system's regulations and policy.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

Termination Retirement Benefits

—Ineligibility

Termination for violations of laws, rules and regulations pertaining to employee's position - Summary decision.

Belliveau v State Bd. of Retirement, Docket No. CR-13-456, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

VETERANS' BENEFITS

Termination of Benefits

Failure to look for work - Duplicative benefits - Rental assistance payments received while rent was being paid by another source - Placement into refund status for overpayment - Summary decision.

Brelsford v. Dep't of Veterans' Services, Docket No. VS-15-594, Decision (Mass. Div. of Admin. Law App., Nov. 9, 2016).

Overpayment of Benefits - “Refund Status”

Failure of veteran receiving M.G.L. c. 115 state veterans’ benefits to look for work - Placement into refund status for overpayment - Receipt of duplicative benefits - Rental assistance payments received while rent was being paid by another source - Summary decision.

Brelsford v. Dep’t of Veterans’ Services, Docket No. VS-15-594, Decision (Mass. Div. of Admin. Law App., Nov. 9, 2016).

WAGE AND HOUR LAWS

Civil Penalties

—Intentional Violations

Painting company - Intentional failure to pay overtime wages - Second or subsequent offense - Citation demanding payment of restitution and civil penalty (\$7,500) affirmed - Summary decision - No response to Fair Labor Division’s motion for sufficiently made and supported summary decision motion showing no genuine dispute as to occurrence of violations, consideration of statutory penalty factors in determining whether to issue civil penalty, and applicable statutory maximum penalty amount for second or subsequent wage and hour violations (\$25,000).

Farh v. Fair Labor Div., Docket No. LB-15-107, Decision (Mass. Div. of Admin. Law App., July 12, 2016)

—Non-intentional Violations

Failure to pay wages timely - Failure to produce payroll records for inspection by Fair Labor Division - Landscaping business - Employees paid mostly by cash in envelopes - Failure to pay wages in timely manner - Checks drawn on company account made out to cash, or to one employee who cashed them and paid other employees - Employee claims for unpaid wages based upon personal recollection, with little or no written record backup - Employer payroll records not produced timely for inspection following Fair Labor Division demand - Fair Labor Division citations to landscaping business owner’s now-defunct corporation for failure to pay wages timely (\$12,089 restitution, and \$2,500 civil penalty) and failure to furnish payroll records for inspection (\$3,500 civil penalty) - Documents in response to payroll records request produced late, at prehearing conference of employer’s appeal (ledger showing wage payments to employees not kept contemporaneously and prepared,

instead, for DALA hearing; handwritten timesheets kept by owner with varying company names or name of employer omitted; check records with owner's notations reflecting source of cash used to pay employees, such as payment from homeowners and businesses for landscaping services) - Citations treated as issued to landscaping business owner, who was corporation's sole officer, consistent with proof at hearing, including employees' understanding of who employer was, responsibility for wage payments imposed by M.G.L. c. 149, § 148, and persons treated as employer by statute - Citation and civil penalty for failure to produce payroll records sustained, primarily because employer did not keep wage and hour records in good order that could have been timely produced upon demand by Fair Labor Division - Difficulty determining unpaid wages for each employee due to cash payments, some via another employer given cash to distribute to others - Total restitution amount modified from \$12,089 to \$7,144.25, reflecting DALA administrative magistrate's recalculation of wage payments based upon credibility evaluations of written evidence and testimony at hearing by employees and employer - Penalty for failure to pay wages timely modified - Absent evidence showing how it was calculated, penalty for nonpayment of wages modified from \$2,500 to \$1,477 in proportion with the modified restitution amount (59 percent of the amount demanded by the citation).

Nessralla v. Fair Labor Div., Docket Nos. LB-14-387, LB-14-388, Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

Failure to pay proper overtime rate - Failure to keep true and accurate payroll records - Restitution - Paycheck deductions for lunch breaks employees were denied or that did not occur - Civil penalties - Non-intentional violations - Computation - Penalty amounts substantially lower than maximum allowed by statute.

Castellano v. Fair Labor Div., Docket Nos. LB-15-224, LB-15-225 and LB-15-226, Decision (Mass. Div. of Admin. Law App., Nov. 18, 2016).

Failure to Pay Wages Timely

Landscaping business - Employees paid mostly by cash in envelopes - Failure to pay wages in timely manner - Checks drawn on company account made out to cash, or to one employee who cashed them and paid other employees - Employee claims for unpaid wages based upon personal recollection, with little or no written record backup - Employer payroll records not produced timely for inspection following Fair Labor Division demand - Fair Labor Division citations to landscaping business owner's now-defunct corporation for failure to pay wages timely (\$12,089 restitution, and \$2,500 civil penalty) and failure to furnish payroll records for inspection (\$3,500 civil penalty) - Documents in response to payroll records request produced late, at prehearing conference of employer's appeal (ledger showing wage payments to employees not kept contemporaneously and prepared, instead, for DALA hearing; handwritten timesheets

kept by owner with varying company names or name of employer omitted; check records with owner's notations reflecting source of cash used to pay employees, such as payment from homeowners and businesses for landscaping services) - Citations treated as issued to landscaping business owner, who was corporation's sole officer, consistent with proof at hearing, including employees' understanding of who employer was, responsibility for wage payments imposed by M.G.L. c. 149, § 148, and persons treated as employer by statute - Citation and civil penalty for failure to produce payroll records sustained, primarily because employer did not keep wage and hour records in good order that could have been timely produced upon demand by Fair Labor Division - Difficulty determining unpaid wages for each employee due to cash payments, some via another employer given cash to distribute to others - Total restitution amount modified from \$12,089 to \$7,144.25, reflecting DALA administrative magistrate's recalculation of wage payments based upon credibility evaluations of written evidence and testimony at hearing by employees and employer - Penalty for failure to pay wages timely modified - Absent evidence showing how it was calculated, penalty for nonpayment of wages modified from \$2,500 to \$1,477 in proportion with the modified restitution amount (59 percent of the amount demanded by the citation).

Nessralla v. Fair Labor Div., Docket Nos. LB-14-387, LB-14-388, Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

Citation for unintentional failure to make timely wage payments to employee vacated as erroneously issued - Demand for restitution (\$5,100) and civil penalty (\$1,100) - Salesperson - Performance of business development and sales work at market research business services company, primarily through via email and telephone contacts - Same pay as business owner (\$25 per hour), with owner proposing (but not committing) to phase in employee as partner, with increasing percentage of ownership as business achieved specified net revenue benchmarks and maintained that net revenue level for three consecutive months - Following last two paychecks (\$3,000 for 120 hours of work, and \$2,000 for 80 hours of work), no pay for two-month period when employee was absent from office, including one month for medical reasons, without notice of absence to owner, who was away at time - Termination of employment upon owner's return for failure to generate business - Complaint filed with Fair Labor Division claimed \$12,000 in unpaid wages for 10-week period without disclosing \$2,000 payment - Unpaid wage restitution claim reduced by Division to \$5,100, following audit of business payroll records, with eight hours of work per day at \$25/hour rate credited for any day on which employee sent email from home on her business email account - Dispute as to whether employee could, or actually did, work from home, and whether employee was commission-only salesperson whose hourly pay rate was drawn against commissions earned, and whether employee was entitled to full day's pay credit for any day on which she sent email using business email account - Credibility issues regarding unpaid wage claim and computation not resolved by hearing testimony or exhibits - Emails not in evidence - Email log created by Fair Labor Division inspector not contemporaneous with

alleged days of emailing - Employee's inability to recall with specificity what work she performed while away from office during two month period - Absence of telephone logs showing whether employee followed up emails from home with telephone calls to business clients and customers - Insufficient evidence that employee worked on days she was absent from office or, thus, that any particular amount of wages was unpaid and owed to employee, or that citation could be modified to demand different restitution or penalty amounts.

McNeil v. Fair Labor Div., Docket No. LB-16-211, Decision (Mass. Div. of Admin. Law App., Mar. 22, 2017).

Lack of prosecution dismissal of appeal challenging citation for failure to pay wages timely, following warnings of this sanction - Failure to appear for status conference scheduled by prior order - Ignoring several prior orders directing petitioners to specify grounds on which they challenged citation, identify their hearing witnesses and the subject of their expected direct testimony, and identify their hearing exhibits - Petitioners' failure to identify, on multiple occasions, their authorized representative or notify DALA or the Fair Labor Division of changes of address to which the petitioners were requesting that filings, or notices, orders and decisions issued, were to be mailed, and failure to respond to subsequent order to show cause why their appeal should not be dismissed - Appealed citation, including restitution amount and civil penalty, made final.

Chiles v. Fair Labor Div., Docket No. LB-14-439, Decision (Mass. Div. of Admin. Law App., Mar. 13, 2017).

Overtime Wages

Aircraft cleaning services company - Failure to pay proper overtime rate - Failure to keep true and accurate payroll records - Restitution - Paycheck deductions for lunch breaks employees were denied or that did not occur - Civil penalties - Non-intentional violations - Computation - Penalty amounts substantially lower than maximum allowed by statute.

Castellano v. Fair Labor Div., Docket Nos. LB-15-224, LB-15-225 and LB-15-226, Decision (Mass. Div. of Admin. Law App., Nov. 18, 2016).

Painting company - Willful failure to pay overtime wages - Second or subsequent offense - Citation demanding payment of restitution and civil penalty (\$7,500) affirmed - Summary decision - No response to Fair Labor Division's motion for summary decision motion showing no genuine dispute as to occurrence of violations, consideration of statutory penalty factors in determining whether to issue civil penalty, and applicable statutory maximum penalty amount for second or subsequent wage and hour

violations (\$25,000).

Farh v. Fair Labor Div., Docket No. LB-15-107, Decision (Mass. Div. of Admin. Law App., July 12, 2016)

Payroll Records Maintenance and Production

Aircraft cleaning services company - Failure to pay proper overtime rate - Failure to keep true and accurate payroll records - Restitution - Paycheck deductions for lunch breaks employees were denied or that did not occur - Civil penalties - Non-willful violations - Computation - Penalty amounts substantially lower than maximum allowed by statute.

Castellano v. Fair Labor Div., Docket Nos. LB-15-224, LB-15-225 and LB-15-226, Decision (Mass. Div. of Admin. Law App., Nov. 18, 2016).